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No. 89-1418

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ILLINOIS CORPORATE TRAVEL, INC.,
d/b/a McTravel Travel Services,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent American Airlines, Inc. respectfully disagrees with Petitioner's statement of the questions presented in this case involving the exclusion of agency relationships from the per se rule against resale price fixing. A proper formulation of the same questions would be:

(1) Whether the District Court and the Seventh Circuit committed reversible error when they found that the relationship between American Airlines, Inc. and its authorized travel agents was one of true agency and not a sham arrangement used to circumvent the antitrust laws.

(2) Whether the right of a principal to control the prices that its authorized agents will charge for its products is lost where a principal chooses to distribute its products through both its own employees and through legitimate sales agents.

THE PARTIES TO THIS PROCEEDING

The caption of the case in this Court contains the names of all parties. American Airlines, Inc. is a wholly owned subsidiary of AMR Corporation.

The following are also subsidiaries or affiliates of AMR Corporation:

Air Services, Inc.
American Airlines Decision Technologies, Inc.
AA Capital
AMR Capital Corporation
AMR Commuter Finance, Inc.
AMR Commuter Finance II, Inc.
AMR Eagle, Inc.
AMR Information Services, Inc.
AMR Insurance Ltd. (Bermuda)
AMR Investment Services, Inc.
AMR Leasing Corporation
AMR Properties, Inc.
AMR Services Corporation
Avenue H Properties, Inc. (Texas)
Blue Sky Number One, Inc.
D/FW Terminal Corporation (49%)(Texas)
AMR/American Airlines Foundation (Texas).

The following are subsidiaries of American Airlines, Inc.:

AA Credit Corporation
AA Ventures I, Inc.
Admirals Club, Inc. (Mass.)
Air California, Inc.
AirCal, Inc.
Air Data Center, Inc.
American Airlines Australian Tours, Inc.

American Airlines de Italy, Inc.
American Airlines de Mexico, S.A. (Mexico)
American Airlines de Venezuela, S.A. (Venezuela)
American Airlines Fuel Corporation
American Airlines Overseas Finance, N.V. (Netherlands Antilles)
American Inter-Island, Inc.
AMR Ventures I, Inc.
AMR Ventures II, Inc.
AMR Ventures III, Inc.
AMR Ventures IV, Inc. (Nevada)
AMR Ventures Holding Company, Inc.
Flagship Hotels, Inc.

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BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent American Airlines, Inc. ("American")[1] respectfully submits this brief in opposition to the Petition by Illinois Corporate Travel, Inc. d/b/a McTravel Travel Services ("McTravel") for a Writ of Certiorari.

OPINIONS IN COURTS BELOW

Denial of Plaintiff's Motion for Preliminary Injunction. Memorandum Opinion and Order dated September 16, 1985 (App. at 1a).

Denial of Plaintiff's Motion for Reconsideration of Denial of Preliminary Injunction. Memorandum Opinion and Order dated January 8, 1986 (App. at 18a).

Affirmance of denial of Plaintiff's Motion for Preliminary Injunction. 806 F.2d 722 (7th Cir. 1986)(App. at 28a).

Grant of Defendant's Motion for Summary Judgment as to Pendent State Law Claims. 682 F.Supp. 378 (N.D. Ill. 1988)(App. 45a).

Grant of Defendant's Motion for Summary Judgment as to Federal Antitrust Claims. 700 F.Supp. 1485 (N.D. Ill. 1988)(App. at 50a).

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[1] American Airlines, Inc. is the wholly owned subsidiary of AMR Corporation. American's subsidiaries and affiliates are listed in The Parties To This Proceeding at the front of this Brief.

Denial of Plaintiff's Motion for Reconsideration of the Grant of Defendant's Motion for Summary Judgment as to the Federal Antitrust Claims. 700 F.Supp. 1485, at 1495 (N.D. Ill. 1989)(App. at 69a).

Affirmance of grant of summary judgment in favor of defendant. 889 F.2d 751 (7th Cir. 1989)(App. at 74a).

Order denying Plaintiff/Appellant's Motion for Leave to File Petition for Reconsideration, En Banc. Order of November 29, 1989 (7th Cir. 1989)(App. at 82a).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals which Petitioner seeks to have reviewed was issued November 13, 1989. Petitioner's Motion for Leave to File a Petition for Rehearing, En Banc, in the Seventh Circuit was denied as untimely. Petitioner's Petition for a Writ of Certiorari in this Court was filed February 12, 1990, but was rejected for failure to comply with Rule 33.1(d). The revised Petition was filed March 9, 1990. Jurisdiction in this Court is based upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Respondent agrees that the statute involved in this case is Section 1 of the Sherman Act, 15 U.S.C. § 1.

STATEMENT OF THE CASE

The Court has been asked by McTravel to reverse the Seventh Circuit's affirmance of summary judgment in favor of American on a claim that it is per se unlawful under Section 1 of the Sherman Act, 15

U.S.C. Sec. 1, for American, acting unilaterally, to require that its authorized travel agents refrain from advertising any fare for travel on American's flights other than American's published fares. A principal's right to set the terms under which its agents may sell the principal's product is well established under the antitrust laws. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 733 (1988); *United States v. General Electric Corp.*, 272 U.S. 476 (1926).

At the time this case arose (1985), American's contracts with its authorized agents required them to advertise American's established fares or no fares at all in connection with the sale of air travel on American. McTravel refused to agree to this contractual provision, and was not allowed to issue tickets for travel on American. McTravel sued and sought a preliminary injunction—which was denied. Memorandum Opinion and Order dated September 16, 1985 (App. at p. 1a). McTravel's Motion for Reconsideration was also denied. Memorandum Opinion and Order dated January 8, 1986 (App. at 18a). McTravel appealed the denial of the preliminary injunction to the Seventh Circuit—and lost. 806 F.2d 722 (App. at 28a). The District Court then granted American's Motions for Summary Judgment on the pendent state law claims, 682 F.Supp. 378 (App. at 45a), and later, on the federal claims, 700 F.Supp. 1485 (App. at 50a). McTravel's Motion for Reconsideration of the grant of summary judgment in favor of American on the federal antitrust claims was denied. 700 F.Supp. 1485, at 1495 (App. at 69a). McTravel appealed the grant of summary judgment in favor of American to the Seventh Circuit—and lost. 889 F.2d 751 (App. at 74a). McTravel's Motion for Leave to File a Petition for

Rehearing, En Banc, in the Seventh Circuit was rejected as untimely. Order of November 29, 1989 (App. at 82a). McTravel then petitioned this Court for a Writ of Certiorari on the federal antitrust claim alleging that the lower courts should have found that American's conduct was per se illegal price fixing.[2]

Despite the many opinions written in this case, the issues are few, the facts undisputed,[3] and the result controlled by established authority in this Court and in other courts. The underlying facts are:

(1) American is a certified air carrier that provides scheduled air transportation on hundreds of flights each day to destinations throughout the world.

(2) McTravel is a travel agency that acts as a sales agent for numerous travel firms, including airlines, hotels, car rental companies, etc.

(3) McTravel does not provide any travel services itself. It has no planes, no hotel rooms, and no rental cars. It books reservations and issues tickets for air travel, hotel rooms, and car rentals, and is paid a commission by airlines, hotel companies and car rental firms for doing so. The commissions, as well as the

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[2] McTravel does not seek review of the decisions of the lower courts on the state law claims or on the federal antitrust claims based on the rule of reason—none of which are mentioned in McTravel's Petition.

[3] McTravel does not assert in its Petition that the lower courts misapplied the standards for summary judgment or that the facts as found by the District Court were disputed. However, the Statement of the Case in McTravel's Petition often misstates the facts as shown by the record and found by the District Court. The facts as set forth in this Brief are taken from those found by the lower courts on the record.

terms under which McTravel may issue tickets and make reservations, are controlled by contracts between the airlines, hotels, and car rental companies and McTravel.

(4) Prior to January 1, 1983,[4] rebating of commissions earned on the sale of air travel by travel agencies was prohibited by federal law. After deregulation of the air travel distribution system, travel agencies, like sales agents in other businesses, sometimes attempted to rebate part of their commissions to end users as a way of increasing the number of transactions they would handle, and thereby increasing the amount of commissions they would receive from their principals.

(5) American made the unilateral decision that it would not be in its best interests for travel agencies to rebate commissions earned on the sale of air travel on American. In part, the decision was based on the fear that "free riding" by rebating agents would undermine American's distribution system. American adopted a policy prohibiting rebating on the sale of its tickets in 1981. Travel agencies were free to do whatever they wanted with respect to the sale of other travel services for other principals.

(6) American concluded that its anti-rebating policy was unworkable. It was too difficult to detect rebating, which was often done in secret. American dropped the policy effective December 31, 1984, and unilaterally adopted a new policy that prohibited its authorized agents from advertising fares other than

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[4] McTravel asserts that the deregulation of commission rebating occurred in 1985. Pet. at 4. *But see* 49 U.S.C. Sec. 1551(a)(2)(A) (repealing 49 U.S.C. Sec. 1373(b)(1)).

American's established fares for travel on American. Rebating itself on the sale of air travel on American was not prohibited, and advertising with respect to other travel services, including the sale of air travel on other airlines, was not restricted.

(7) McTravel sought to become an authorized agent for the sale of air travel on American after American adopted its no-advertising policy. McTravel's basic business plan included the widespread advertising of 10% reductions off the published fares of airlines. Not surprisingly, McTravel declined to accept American's no-advertising policy and did not become an authorized agent for the sale of air travel on American.[5]

(8) McTravel unsuccessfully sued American, alleging that American's no-advertising policy was per se illegal price fixing. American successfully defended itself and its policy on the ground that it was a lawful restriction imposed by a principal on its sales agents.

These facts set forth what this case is about. By way of contrast, this case is **not** about the following things mentioned in McTravel's Petition:

(1) This case has nothing to do with the alleged "rejection" of the "indicia of entrepreneurship test" by the Seventh Circuit in agency cases. Two District

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[5] There is a dispute between the parties as to whether McTravel ever became an authorized agent for the sale of air transportation on American. American contends that because of McTravel's refusal to accept American's no-advertising policy, it never became an agent for American. It is undisputed, however, as found by the District Court, that McTravel never agreed to nor complied with American's no-advertising policy. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 700 F. Supp. 1485, 1489 (N.D. Ill. 1988) (App. at 57a).

Judges and two panels of the Seventh Circuit looked at the relationship between American and its authorized travel agents and concluded under the standards used by this Court and every other court that a true agency relationship, not a resale relationship, existed. This case is squarely in the mainstream of court decisions on this subject. The opinions issued in this case adopt the opinions of numerous other courts, and other courts have adopted the opinions issued in this case.

(2) This case has nothing to do with the application of the per se rule of antitrust doctrine to vertical resale price fixing. At no place or time did any of the courts which decided this case in favor of American say that vertical resale price fixing, where it exists, should be treated under anything other than the per se rule. The fact is, this case does not involve vertical resale price fixing because, as in all agency relationships, there is no resale of the principal's product by the agent. The agent acts like an employee, and has no pricing authority independent of the principal.

(3) This case has nothing to do with horizontal price fixing. While American has chosen to distribute its products through employees stationed at ticket counters and at company-owned city ticket offices, as well as through authorized travel agencies, it has not created true economic competition in the sale of its products between its employees and its authorized agents. Both are under the same common control, and American does not favor one form of distribution over another. American competes with other airlines, not with itself.

SUMMARY OF ARGUMENT

The District Court properly found that American's authorized travel agents were true agents, and not resellers of air travel on American. There is nothing novel about that finding or the way in which it was made. The facts surrounding the relationship, which were not disputed, show that all of the indicia of ownership reside with American, and that McTravel faces none of the business risks except those normally associated with all firms that operate as sales agents for others. The decisions of this Court and of every other court support that finding. Thus, the Seventh Circuit's affirmance was proper.

This Court and every other court have held that a principal may establish the price at which its authorized agents obtain orders for the principal's products, and that such conduct does not constitute vertical resale price fixing. Nor is the result any different if the principal sells its products both through its own employees and through authorized agents, as is done by American and many other firms. Firms which use both employees and agents to distribute their products still retain the right to control the prices that may be charged for their products. The conduct at issue here did not directly fix prices, but was less restrictive. Authorized agents were free to rebate, but were prohibited from advertising prices for air travel on American which were different from American's established prices. However, even if the conduct did control prices, the District Court and the Seventh Circuit were justified in finding that the undisputed facts showed that American's actions were the lawful actions of a principal with respect to its agents, and not illegal price fixing.

ARGUMENT

I. The District Court's Finding That American's Authorized Agents Were "True Agents" Was Fully Supported By The Undisputed Facts And The Applicable Law, And Was Properly Affirmed By The Seventh Circuit.

Contrary to what is said in McTravel's Petition, the District Court and the Seventh Circuit evaluated the undisputed facts concerning the relationship between American and its authorized travel agents under the established standards set forth in the many cases discussing the agency doctrine. The District Court carefully looked at each of the "indicia of entrepreneurship" presented by the parties, and concluded that the undisputed record showed that a "true agency" relationship existed. Those indicia included the following:

(1) McTravel's own sales document, written by its counsel of record in this lawsuit and given to all of its customers, states:

> "McTravel is only an agent for the airlines, hotels and car rental companies, which means that they pay us to help you buy services from them."

Illinois Corporate Travel, Inc. v. American Airlines, Inc., 700 F. Supp. 1485, 1492 (App. at 62a-63a).

(2) The Airline Reporting Company ("ARC") agreement, which is the "master contract" McTravel contends controls the relationship between airlines and travel agencies [Pet. at 3], states:

> "This agreement establishes a principal-agent relationship between the Agent and appointing [air] carriers."

(3) The Civil Aeronautics Board stated at the time it deregulated rebating, based upon an in depth, multi-year study of the travel agency system:

> "Our decision does not materially affect travel agents' obligations to their air carrier principals. If a carrier decides to require agents to charge exact prices after October 1st, . . . we believe that a carrier need only communicate its decision to the travel agent and that the travel agent would then be bound by those instructions because agents are obligated to abide by the reasonable instructions of their principals."
>
> * * *
>
> "Antitrust concerns that have been raised appear to be overstated. We have already concluded that the agency exception to the general proscription on the setting of retail sales prices will apply to the airline industry, a position strongly urged by a number of parties to this proceeding, including the Justice Department."

46 Fed. Reg. 46787, 46788-89.

(4) The risks associated with the sale of air transportation all reside with American, not with its authorized agents. Those risks include the risk of unsold seat inventory. In 1985, American had an inventory of over 7.17 million seats available for sale at any one time. If those seats went unsold, American suffered the loss of its investment in the equipment, crews and staffing necessary to operate the airline.

(5) The risks which travel agents face as persons engaged in the business of acting as agents for others are minimal, and are those normally faced by all sales

agents. For example, McTravel's basic cost of doing business is no different than the basic cost of a real estate agent's office. The fact that both have costs of doing business as agents does not deny their status as agents.

(6) All aspects of the sale of air transportation are controlled by the air carrier. The product—air transportation—is delivered to the customer by the airline. The travel agent takes the reservation and collects payment subject to the specific contractual instructions of the airline. No reservation may be made or ticket confirmed without the agent first checking with the airline. If a flight is cancelled or late, or luggage is lost, airlines reimburse the traveller. The travel agent does not act as an independent competitor in the market for air travel.

(7) The travel agency system was created by the airlines to expand the distribution of air travel, not to suppress competition. No competition was eliminated by the creation of an entirely new distribution channel. Moreover, it was logical to create a distribution channel based upon agents rather than resellers because of the special nature of the airline product and the need for the airline to control the sale of its inventory of seats.

These facts show that American's authorized agents are commission sales agents, and not resellers of air travel. Based on these facts, the District Court and the Court of Appeals found that travel agents are true agents, and not resellers of air transportation. No special "test" was needed, and none was used. The decisions of this Court and of the other Circuits

were cited liberally by the District Court and the Court of Appeals in analyzing the facts presented.[6]

Just as it is trapped by its own sales document which describes McTravel as "only an agent," McTravel is caught by its own attempt to twist the facts in its Statement of the Case. While suggesting that travel agents are "retailers" selling air transportation at the "full retail price," McTravel also states that it is compensated by way of a commission paid by the travel service supplier. [Pet. at 4.] A "retailer" earns its profits from the difference between what it pays for its inventory and the price it can charge the consumer, not from commissions paid by its suppliers. McTravel's description of its business is consistent with that of an agent, not a reseller, for McTravel has no inventory of air transportation and is compensated by way of commissions, not mark up.

McTravel ignores the undisputed facts of this case and the careful analysis of those facts by the courts below, and invites this Court to engage in a theoretical, hypothetical and abstract contemplation of the language used by the Seventh Circuit in some of its decisions. If the "test" for agency status set forth

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[6] Of the five Circuit Court decisions cited by McTravel as in conflict with the Seventh Circuit (Pet. at 5), the District Court cites and adopts four (*Hardwick v. Nu-Way Oil Co.*, 589 F.2d 806 (5th Cir. 1979), *cert. denied*, 444 U.S. 836 (1979); *Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988); *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339 (9th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983); and *American Oil Co. v. McMullin*, 508 F.2d 1345 (10th Cir. 1975)), while not mentioning the fifth (*Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975)). This does not suggest a "conflict" between the Circuits.

by the Seventh Circuit in *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986), is theoretically capable of an interpretation that conflicts with the tests set forth in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), and other cases, that is not relevant here. The test **as applied** by the District Court in this case reached the proper result. No court would have found American's authorized agents to be anything other than true agents under the undisputed facts.

But the Seventh Circuit's test is **not** different from the test used in every other Circuit and in the decisions of this Court. The opinions in *Morrison, Kowalski v. Chicago Tribune Co.*, 854 F.2d 168 (7th Cir. 1988), and in this case reflect a careful and scholarly approach to the application of the uniformly accepted way in which the agency doctrine is applied. The fact that the proper result is reached in each of these cases is evidence that the proper test is being used. The fact that these cases rely upon the decisions of the other Circuits suggests no conflict. Moreover, the courts in other Circuits have adopted the Seventh Circuit's decisions—obviously seeing no conflict. *AdVantage Telephone Directory Consultants, Inc. v. GTE Directories Corporation*, 849 F.2d 1336, 1346 (11th Cir. 1987)(citing *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*); *Belfiore v. New York Times Co.*, 826 F.2d 177, 182 (2d Cir. 1987)(citing *Morrison v. Murray Biscuit Co.*); *Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1222 and 1224 (8th Cir. 1987)(citing both *Morrison v. Murray Biscuit Co.* and *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*). As shown by the widespread acceptance of its decisions by other courts, without a single note of

disagreement, the Seventh Circuit has not deviated from any established doctrines in antitrust law.

The Seventh Circuit has not left the agency doctrine "without meaningful content," either. [Pet. at 7.] It is simply not true to say that vertical resale price fixing is now per se lawful in the Seventh Circuit because of a "loophole" created by the Court of Appeals. Even after *Morrison v. Murray Biscuit Co.*, vertical resale price fixing is routinely condemned as per se illegal in the Seventh Circuit where an agreement fixing prices is shown to exist. *See Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987)(trial court's grant of defendant's motion for judgment notwithstanding the verdict in a vertical price fixing case reversed by the Seventh Circuit even though evidence offered by plaintiff at trial was weak); *Magid Mfg. Co., Inc. v. U.S.D. Corp.*, 654 F.Supp. 325, 328 (N.D. Ill. 1987)("Concerted action between manufacturer and distributors to set prices has been per se illegal since the early years of national antitrust enforcement."). Contrary to the picture McTravel paints, the antitrust laws are alive and well in the Seventh Circuit.

II. The Agency Doctrine Recognizes A Principal's Right To Set The Terms Under Which Its Agents May Distribute Its Products, And Applies Whether Or Not The Principal Also Distributes Its Products Through Its Own Employees.

It is not price fixing for a firm to set the price[7] its sales agents will obtain for its products. *Business*

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[7] For purposes of argument, it has been presumed that American's no-advertising policy could constitute vertical price fixing. However, despite the ban on advertising rebates, travel agents

Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 733, (1988); *United States v. General Electric Corp.*, 272 U.S. 476 (1926). A principal may control its agents much like it may control its own employees. The sale transaction is between the principal and the buyer, and does not include an intermediary with separate pricing authority or competitive significance in the marketplace.

The agency doctrine has never been limited to situations where the principal distributes its product solely through agents. In fact, in *General Electric*, the case which established the doctrine, the principal sold both through its own employees and through agents. In addition to the Seventh Circuit, the Eighth Circuit has explicitly recognized that the agency doctrine applies in a dual distribution situation. *Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1222-23 (8th Cir. 1985). No Circuit has held to the contrary.

The decision in *United States v. Masonite Corp.*, 316 U.S. 265 (1942), did not create a limitation on the agency doctrine aimed at distinguishing between principals that sold only through agents and those that also sold through their own employees. Instead, *Masonite* applied the "sham" limitation to alleged agency relationships, and is very similar to this Court's later decision in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (an opinion authored by the same Justice). The problem in *Masonite* was that the del

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were in fact free to rebate on the sale of air travel on American, and the record shows that rebating occurred. Under this Court's decision in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), the express agreement on price required to prove vertical resale price fixing is absent. That is an additional ground for denying certiorari.

credere agency relationship between competing hardboard manufacturers was a sham which eliminated existing and potential competition.[8] There was no true agency relationship in *Masonite*, as noted by the Court.

> When it is clear, as it is in this case, that the marketing systems utilized by means of the del credere agency agreements are those of competitors of the patentee and that the purpose is to fix prices at which the competitors may market the product, the device is without more an enlargement of the limited patent privilege and a violation of the Sherman Act.

United States v. Masonite Corp., *supra*, 316 U.S. at 279.

Sun Oil Co. v. Federal Trade Commission, 350 F.2d 624 (7th Cir. 1965), *cert. denied*, 382 U.S. 982 (1986), is the same type of case as *Masonite* and *Simpson*—a sham agency case. As the District Court noted (700

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[8] There are two key aspects to the situation found in *Masonite* which are not found here. First, the "agents" were in fact competing manufacturers of hardboard who ceased manufacturing the product to become "agents" of each other. This was classic cartel behavior among existing competitors. Second, the form of agency relationship used by the conspirators in *Masonite*—a "del credere" agency relationship—is practically indistinguishable from a sale transaction. A del credere agent guarantees the sale and assumes all of the risk of loss if the buyer defaults. When this is combined with the record in *Masonite* which showed that the "agents" placed orders for hardboard without having purchasers arranged in advance, it creates a relationship where, in essence, the "agents" in *Masonite* were purchasing hardboard from Masonite, holding it in inventory, and reselling it.

F.Supp. at 1496) (App. at 71a), a broad reading of *Sun Oil* could lead to the conclusion that the Seventh Circuit believed that *Masonite* had overruled *General Electric*. However, the Seventh Circuit has stated more recently that this was not its intent in deciding *Sun Oil*. *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1436 (7th Cir. 1986). And, more importantly, this Court has recently stated that *General Electric* has not been overruled and is good law. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 733 (1988).

Trying to shoehorn this case into the same fact pattern as found in *Masonite* is impossible. American and its authorized agents are not in the same position as were Masonite and the other hardboard manufacturers. Travel agencies do not own airplanes, hire crews and fly scheduled air service. In defining the relevant market for scheduled air transportation, would anyone include travel agencies as competitors in that market? Travel agencies play a role in the sale of air transportation because of—and solely because of—their appointment as authorized sales agents for the airlines. Absent that appointment, they would not exist at all. This is a far cry from the *Masonite* facts where existing, independent competitors used a sham relationship to cover up an agreement to end competition between them.[9]

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[9] Rather than being competitors, an agent and its principal are treated as if they are the same economic entity for antitrust purposes, incapable of conspiring with each other on matters covered by the scope of the agency relationship. *Pink Supply Corp. v. Hiebert, Inc.*, 612 F.Supp. 1334, 1338-40 (D.Minn. 1985), *affirmed*, 788 F.2d 1313, 1317 (8th Cir. 1986); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914-15 (5th Cir.

It would be illogical and contrary to the goals of the antitrust laws to have a rule like that suggested by McTravel, forbidding firms from using agents and employees side-by-side to distribute their products. Consumers are better served if a manufacturer may maximize the channels and outlets through which it may distribute its products. We all benefit from the efforts of airlines like American to make it as easy as possible for us to purchase air transportation. A restriction on the agency doctrine that makes a firm choose between agents or employees would reduce consumer choice.

Interbrand competition, which has been a key focus of antitrust inquiry in the vertical context since *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), is enhanced where a firm can compete not only on the merits of its product, but on the merits of its distribution system. Allowing a firm to use all distribution options available to it, so long as they are not sham efforts to avoid antitrust restrictions, increases competition.

Any concerns about the preservation of numerous small businesses are better served by a rule that does not unreasonably limit the use of agents, for the agency doctrine does not stifle individual entrepreneurship, but fosters it. Would there be as many travel agencies in this country if agents actually had to purchase tickets from airlines in advance and hold them in inventory in hopes that someone would pur-

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1952), *cert. denied*, 345 U.S. 925 (1953). *See generally Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

chase them?[10] Could travel agencies really assume all of the risks associated with the operation of an airline and the sale of its highly perishable product: a seat on a given flight at a given time on a given day? The agency option allows these small businesspeople to start their businesses with little investment and little risk based upon sunk costs.

Thus, the agency doctrine announced in *General Electric*, reaffirmed as recently as *Sharp Electronics*, and followed by the courts in this case, has wisely not distinguished between firms that use only agents to distribute their products and firms that use both agents and employees.

CONCLUSION

Neither the District Courts in the Seventh Circuit nor the Court of Appeals have abandoned the antitrust laws or set out on a divergent path with respect to the way the antitrust laws treat true agency relationships. The undisputed facts in this case showed that American's authorized agents are not resellers of air travel and that the agency relationship is not a sham. Under those facts, this Court and every other court would have granted American summary judg-

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[10] Travel agents or others may purchase tickets from American or other airlines under what are called bulk sales transactions. Such tickets are sold at a discount, cannot be exchanged for use on another flight, and are non-refundable. Under such circumstances the owner of the bulk sales ticket is a reseller of air travel, and has the risk of loss if the tickets are not resold. However, this case has nothing to do with bulk sales. They are not subject to American's no-advertising policy. *See* Memorandum Opinion and Order dated September 16, 1985 (App. at 8a n.2).

ment, just as was done by the courts below. No novel questions are presented. The Petition for a Writ of Certiorari should be denied.

Dated: April 6, 1990

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 85 C 07079

ILLINOIS CORPORATE TRAVEL, INC.
d/b/a/ McTravel Services,

Plaintiff,

v.

AMERICAN AIRLINES, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This antitrust case is before the court for ruling on plaintiff's motion for preliminary injunction. The case was filed August 12, 1985. A ten day temporary restraining order was issued by Judge Moran, acting as emergency judge, on August 15th. On August 23, Judge Aspen, acting as emergency judge, extended the order for ten days. When I returned from vacation on September 4, we scheduled a preliminary injunction hearing to begin September 11th. Although the TRO expired on September 3, and defendant would not agree to a further extension, defendant did agree to abide by the terms of the TRO until this court could rule. I promised to rule promptly.

The parties conducted expedited discovery. Many of the defendant's employees were deposed. The Vice President of the plaintiff and a representative of one of plaintiff's competitors were deposed. The parties submitted deposition excerpts and sworn declarations of their principal witnesses. Only three witnesses were called to testify for

cross-examination on their declarations. Finally, the parties submitted pre-hearing memoranda. The hearing was conducted on September 11, and I heard oral argument from counsel on September 12th. On Friday, September 13, I entered a minute order denying the motion for preliminary injunction with opinion to follow on Monday, September 16th. This opinion constitutes the court's written findings of fact and conclusions of law.

Plaintiff's action is under Section 1 of the Sherman Act which prohibits contracts, combinations and conspiracies in restraint of trade. Specifically, plaintiff claims a per se violation based on allegations that defendant's concerted action constituted resale price maintenance. The defendant has denied that it is guilty of a Section 1 per se violation. The background facts, which are undisputed, are as follows:

Following deregulation in the airline industry, specifically during the period 1981 through 1984, American Airlines, Inc. ("American") had a written policy prohibiting its travel agents from rebating all or part of the agent's 10% commission to the purchaser of the airline ticket. Obviously, any such rebate would reduce the cost of the ticket to the consumer. American determined that it could not police its rebate policy. During the period the policy was in effect, some travel agents did rebate to their corporate accounts. This accords with the court's general knowledge and experience and it is not disputed by the defendant.

The rebate policy was contained in an Addendum to a contract between American and each of its authorized travel agents. This contract expired December 31, 1984. A new contract became effective in 1985, and in January of 1985 American distributed a new Addendum to its travel agents. To become an authorized agent for American, a travel agent must agree to the terms and conditions of the Addendum. The new Addendum did not prohibit re-

bating, but it did prohibit advertising rebating. As a result, travel agents could rebate to any of their customers but they could not advertise the practice. A practical result of this policy is that large consumers of air travel, such as corporate accounts, could negotiate a rebate from their travel agents, but small consumers would not learn of the possibility of obtaining a rebate. Travel agents would not likely volunteer a rebate to small consumers.

In the months following the adoption of the new Addendum, American encountered instances in which travel agents were violating the prohibition against advertising rebates. As a result, in July of 1985, American reexamined its policy regarding the advertising of rebates by travel agents. The policy was reaffirmed and a procedure outlined for enforcement of that policy. On July 11, 1985, all American Sales Managers and Representatives were advised of these new procedures. The procedures included a "cease and desist" letter to offending travel agents, asking them to confirm back that they had stopped the advertising. Within a short time American stopped asking for confirmation back because it was proving too controversial. Instead, American would follow up by seeing if later advertisements by the offending travel agent appeared. Despite the apparent desire of many travel agents to advertise rebates, American continues to enforce its contractual prohibition on the advertising of rebates.

The plaintiff is Illinois Corporate Travel, Inc. d/b/a McTravel Services. Illinois Corporate Travel, Inc. (ICT) is an established travel agent in Illinois and it holds a valid American validation plate which is used to write American tickets. Early in 1985, ICT opened a branch office in Northbrook, later to be called McTravel Services ("McTravel"). As a branch office of an authorized travel agent, McTravel was allowed to write airline tickets. Between January and March, 1985, McTravel used ICT's American validation plate to sell seats on American. In March of 1985, McTravel received authorization from Airlines Re-

porting Corporation ("ARC") to operate as a travel agency and it commenced business under the name McTravel.

Beginning early in 1985, McTravel began discounting tickets for air transportation to ultimate consumers and has heavily publicized the fact that it sells all air transportation tickets at the given commercial air passenger carrier tariffed rate, less the standard commission received by travel agents from all air carriers. McTravel rebates the commissions it receives to customers, and charges $8.00 for making the reservation and $7.00 for issuing the ticket, and the customers are given the opportunity to make their own reservations. As a result, consumers of air travel services are afforded the opportunity to realize substantial savings on most flights.

In mid-January of 1985, American received a compliant from IVI Travel about McTravel and American representatives were sent to McTravel's office in Northbrook. They informed McTravel that American had received complaints from other travel agents, that McTravel was violating American's policy, that American had a problem with McTravel's rebating, and that unless its practices ceased, McTravel could not write American tickets. A follow-up telephone call included similar statements. At the time of these encounters with McTravel, the American representative who recalls the conversations, Susan Wellinghoff, was confused about the nature of American's policy. She clearly was talking about a policy against rebating, but American's policy prohibited advertising. Later in January, a meeting scheduled betwen McTravel and Mr. Gard, a District Sales Manager for American in Chicago, ws cancelled by Gard. Gard stated that as long as McTravel continued to advertise, there was nothing to talk about. American had made a decision to not issue an American validation plate to McTravel when McTravel applied for the plate.

In late July, American learned that McTravel was using its Eastern validation plate to write American tickets.

American then advised other airlines that it would not accept American tickets issued by McTravel on those airlines' validation plates.[1] As a result, McTravel cannot write American tickets. This lawsuit followed.

First Claim

Plaintiff's first claim is that the contract between American and each of its travel agents prohibiting advertising of rebate constitutes a contract in restraint of trade under Section 1. The prohibition on advertising rebates is a price (as opposed to a non-price) restriction. *United States v. Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7th Cir. 1961). The defendant does not argue to the contrary. *Cf. White Motor Co. v. United States*, 372 U.S. 253, 260 (1963) (stating that restrictive practices ancillary to a price-fixing agreement may be restrained if integral to the success of the agreement).

An agreement between a seller and its buyer fixing the price at which the buyer may resell the product is a per se violation of Section 1 of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1469 (1984). Defendant argues that the contract at issue here is protected by the so-called "agency" exemption to the ban on resale price maintenance. The court agrees.

The very first case condemning resale price maintenance per se, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), involved a purported consignment contract. Justice Holmes, dissenting from the majority opinion, observed that if the manufacturer had made "the retail dealers also agents in law as well as in name, and [had] retain[ed] the title until the goods left their hands, I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would

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[1] American and the other airlines have agreements among them which permit a travel agent to use any airline's validation plate to write tickets on other airlines.

deny that the owner was acting within his rights." 220 U.S. at 411.

Justice Holmes' observation was justified by the Supreme Court decision in *United States v. General Electric Co.*, 272 US. 476, 488 (1926). In that case, the Supreme Court held that there was no antitrust violation where the "owner of an article, patented or otherwise" sought to sell his articles directly to the consumer by utilizing a "genuine contract of agency" which fixed the price by which agents transferred the title from the manufacturer directly to the consumer.

Widespread use of the consignment device to avoid antitrust liability for resale price maintenance was thrown into confusion by the Supreme Court's decision in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). In that case, the Supreme Court held that a consignor's termination of a retailer/consignee for failure to sell at fixed prices violated Section 1 of the Sherman Act notwithstanding the agency features of the arrangement. The Court looked at the substance of the consignment agreement rather than its form, and concluded that the consignment was in fact resale price maintenance, coercively employed. The Court reaffirmed the principle that "an owner of an article may send it to a dealer who may in turn undertake to sell it only at a price determined by the owner" without violating the antitrust laws. However, the court also said that when a consignment "device" is used "to cover a vast . . . distribution system, fixing prices through many retail outlets, the antitrust laws prevent calling the 'consignment' an agency." 377 U.S. at 21. The Court then distinguished *General Electric* as a case whose "ratio decidendi" rested on the patentability of the article. 377 U.S. at 24.

The broad language of *Simpson* coupled with its distinguishing of *General Electric* could be interpreted as a blanket condemnation of all consignment agreements in which fixed prices are maintained through a vast distribution

system. Subsequent cases, however, have interpreted *Simpson* to prohibit resale price maintenance devices *only* where the consignees bear the risks of the distribution process as was true of the gasoline station operators in *Simpson*. In *Hardwick v. Nu-Way Oil Co., Inc.*, 589 F.2d 806 (5th Cir.), *cert. denied*, 444 U.S. 836 (1979), the Fifth Circuit stressed that the independent status of the consignees in *Simpson* was "vital" to the Supreme Court's rationale, and that where an oil company retained ownership of gasoline sales equipment and expense of repairs, and bore the risk of unsold gas, no Section 1 liability could be upheld as a matter of law. The *Hardwick* court noted that contract terms such as "consignee" could not control, but held that the agents in this situation were more like employees than independent businessmen.

A case closer to the present one is *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979). In that case, the Second Circuit reasons that sugar brokers who took no possession of the sugar nor title thereof but who simply negotiated sales as purchasing agents for the manufacturer's customers with no pricing authority were agents as a matter of law. Although the holding of the case rested on a finding of no conspiracy, the remarks about the agency status of the brokers are significant, since the court obviously took little significance in the fact that the brokers negotiated sales for other manufacturers besides the defendant. Thus, even though the brokers could not be considered "employees" of the defendant, as was the case in *Holter v. Moore & Co.*, 702 F.2d 854 (10th Cir.), *cert. denied*, 104 S.Ct. 347 (1983) (real estate agents licensed to sell for one broker only), the court found *Simpson* inapplicable.

In the course of the Civil Aeronautics Board's investigation into airline marketing, *Competitive Marketing Investigation*, the CAB concluded that the principal/agent relationship between airlines and travel agencies would preclude antitrust liability, and the Department of Justice

concurred in this view. The Board's finding is entitled to weight, though not to the same deference which would be accorded the CAB in the interpretation of the federal aviation laws.

A travel agent does not assume the significant risks and duties that resellers in a vast distribution scheme assume. The travel agent has no risk of unsold inventory, no credit risk, no authority to set the price, and no freedom to sell the product without checking with the airline for availability. The product is delivered directly from the airline to the customer, and the travel agent never takes "title" to the airline seat or assumes the risk that a particular seat may go unsold.

Plaintiff argues that there is no agency relationship between the airline and the travel agent because they compete in the sale of the product. While both sell the product to the consumer, there is no true competition between the airline and the agent.[2] According to defendant's witnesses, American is just as happy to sell through a travel agent as sell directly to the consumer. The travel agents constitute a vast network through which American can sell its product. American advertises "See your travel agent or the airline." While the plaintiff pointed to one example involving a car rental promotion in which American specified that the consumer should not see his travel agent, as a general proposition the airline sells directly or through its travel agents depending on the consumer's choice.

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[2] In one situation not involved in this case, the airline competes with the travel agent. This occurs when the travel agent makes a bulk purchase of seats from the airline and resells the seat. Here the travel agent has the risk on the transaction and is actually competing with the airline. At oral argument, plaintiff's counsel appeared to concede that the fact that there can be competition between the airline and the travel agent in this situation is not relevant in determining whether there is a true agent/principal relationship bewteen the travel agent and the airline.

In sum, the court finds that there is a true agent/principal relationship between American and its travel agents with regard to the selling of air travel and that the existence of such a relationship prevents a finding of resale price maintenance in connection with plaintiff's first claim.

Second Claim

The plaintiff's principal claim is that American conspired with McTravel's competitors in connection with the application of American's advertising policy against McTravel and that such concerted action constitutes a per se violation of Section 1. American defends against this claim on two levels. First, it argues under the intra-enterprise conspiracy doctrine that as a matter of law a principal cannot conspire with its agent. Next American argues that there is insufficient evidence of any such conspiracy to justify the issuance of a primary injunction.

The intra-enterprise conspiracy doctrine was most recently discussed by the Supreme Court in *Copperweld v. Independence Tube Corp.*, 104 S.Ct. 2731 (1984). The Court held that a parent cannot conspire with its wholly owned subsidiary. In discussing why under these facts there is no intra-enterprise conspiracy under Section 1 of the Sherman Act, the Court emphasized that the officers of a single firm "are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." 104 S.Ct. at 2741. The Court criticized the previous "single entity" test as inadequate for preserving the Sherman Act's distinction between unilateral and concerted conduct, since that test had looked to form rather than substance. Noting the fact that a parent and its wholly owned subsidiary have a complete unity of interest, the Court held that separateness of day-to-day operations could not overcome that fact for purposes of the Sherman Act. *Id.*; 104 S.Ct. at 2742.

The question for this court is whether American and each of its travel agents is a single economic entity with a complete unity of purpose so that they are legally incapable of conspiring with each other. *See Copperweld*, 104 S.Ct. at 2741-2742. Despite the fact that there is a true agent/principal relationship between the airline and the travel agent, I conclude that there are sufficient differences between them that they do not constitute a single economic entity in connection with actions taken to enforce American's advertising policy.

There are certain obvious differences. Travel agents represent all airlines and numerous other entities. They offer services not available from airlines. They have an economic interest in maximizing their profit on the sale of all of their products and services. Although Mr. Taylor (Director - Travel Agency Sales for American) testified that American expected its travel agents to promote American and American's destinations, that is unrealistic and does not accord with the court's general knowledge. One of American's best travel agent producers in the Chicago area, Richard Incandela of IVI Travel, testified by deposition that it makes no effort to promote American's flights above those of other carriers.

Between American and its travel agents, there is no common ownership, no common management, no combined decision making, and no common purpose in enforcing the advertising ban. For example, American asserts that it adopted its advertising policy completely unilaterally without input from any travel agents and the plaintiff informed the court that it did not contest this proposition.

The advertising policy favors some travel agents (the larger agencies who have corporate accounts) and disfavors small agencies and new entrants into the field. American's authorized travel agents indisputably compete with one another, as McTravel's marketing efforts clearly suggest. Those agents have an interest in suppressing price com-

petition which dovetails, but does not exactly match, American's interest in getting the maximum price it can exact for its seats.

The sole case supporting American is *Fuchs Sugars & Syrups, supra.* In that case, the appellant had argued that the defendant's sugar brokers were "an instrumentality of the [defendant] and consequently were not independent entities with whom Amstar could conspire under §1." 602 F.2d at 1030-31. In an elaborate footnote, the Court concluded that the sugar brokers were indeed mere agents. *Id.* at 1032 n.5. However, the Court found no conspiracy under the facts of the case, and therefore never addressed the significance of its footnote for the appellant's argument that no conspiracy could legally exist.

As noted in *Holter v. Moore & Co.*, 702 F.2d 854 (10th Cir.) *cert. denied*, 104 S.Ct. 347 (1983), the courts have been unclear whether outside agents, rather than internal employees, can be held to have conspired with their principal under Section 1 of the Sherman Act. At least one Supreme Court case suggests that they can. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). In *Albrecht*, a newspaper publisher attempting to enforce a resale price maintenance scheme took over the route of a price-raising distributor, Albrecht, and hired a circulation agency, Milne, to solicit subscriptions from Albrecht's customrs. The publisher then hired a competing distributor to deliver the papers which Milne, the circulation agency, had lured away from Albrecht. The Supreme Court held there was "no doubt" as to a conspiracy between the competing distributor, the soliciting agent, and the publisher.

The Third Circuit has interpreted *Albrecht* as finding an agent/principal conspiracy only where at least two members of the combination stood to benefit by the restraint of trade. *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1073-74 (3d Cir. 1978). Thus, the knowing participation of the competing distributor in the case was crucial.

In the present case, plaintiff has alleged that American conspired with certain travel agencies to punish McTravel and thereby to suppress price competition within the travel agency business. Plaintiff has also introduced evidence to show that one of the alleged conspirators, IVI Travel, is American's chief Chicago agent, receives excess commissions from American, and is itself a rebater. While the ultimate probativeness of this evidence can be questioned, the separateness of IVI's and American's interest in this matter are clear. If American, in terminating McTravel, was "acceding to [IVI's] desire rather than acting to promote an independent conception of its own self-interest," *Valley Liquors, Inc. v. Renfeld Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982), an unlawful Section 1 conspiracy could be found under the facts of this case notwithstanding *Copperweld*.

Having held that there could be a conspiracy between American and some of its travel agents, the next question is whether the evidence of such a conspiracy is sufficient for the issuance of a preliminary injunction. Under the Supreme Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1471 (1984), evidence that a manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors is insufficient for an antitrust plaintiff to survive a motion for directed verdict. In *Monsanto*, the Supreme Court required some evidence to exclude the possibility of independent action. The Court upheld a jury verdict for the plaintiff, however, where the manufacturer had threatened price-cutters with lessened supply to force compliance, had induced one distributor's parent to instruct its subsidiary to comply, and where one distributor sent a newsletter to his dealer-customers talking about Monsanto's cooperation in efforts to maintain a minimum market price level. The court found this evidence relevant and persuasive as to a meeting of minds between Monsanto and its distributors which went beyond unilateral action.

The evidence presented to the court establishes that American initially contacted McTravel after receiving a complaint from IVI, a competing travel agent. There is also evidence that IVI is a large travel agent in Chicago and a big producer for, and favored by, American. There is also evidence of other contacts between travel agents and personnel at American about McTravel. Plaintiff has also shown evidence that one agency, Cruise Match in Buffalo Grove, sent an employee to McTravel to purchase an American flight for herself. Gerber obtained a refund the next day, and copies of the ticket invoices somehow found their way to American. Finally, there is evidence of American's policy of sending "cease and dsist" leters and asking for confirmation back from the offending travel agency that the advertising had ceased.

This evidence, while certainly probative of a conspiracy and perhaps sufficient to withstand a motion for summary judgment, is not inconsistent with a finding that American acted unilaterally in making its decision to cease dealing with McTravel. There is no evidence, for example, that the travel agents conferred with each other about McTravel or did more than voice complaints to American. As noted in *Monsanto*, complaints about price-cutters are natural and unavoidable reactions by distributors to the activities of their rivals. 104 S.Ct. at 1470.

The court finds believable the testimony of Mr. Gass (Regional Manager-Passenger Sales for American) that the important decision about McTravel was made by him and Mr. Gard (a District Sales Manager for American in Chicago) in January of 1985, shortly after learning about McTravel's advertising, and that it was made for the purpose of implementing American's advertising policy and not to placate other travel agents. The decision was not immediately communicated to McTravel because American did not believe that McTravel had become an authorized travel agent through certification by ARC. McTravel had not yet requested an American validation plate.

Nevertheless, the plaintiff has some evidence of a conspiracy. The question is whether this justifies the issuance of a preliminary injunction. The parties have disagreed about the prevailing preliminary injunction standards in the Seventh Circuit, the defendant seeing a conflict in recent cases in this circuit. Thus, the standards as this court understands them will be discussed.

To obtain a preliminary injunction, a movant must show: 1) that it will suffer irreparable injury if the injunction is denied; 2) that this harm exceeds the harm the nonmovant will suffer if injunctive relief is denied; 3) that the movant has a probability of success on the merits; and 4) that the injunction will not harm the public interest. *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 382 (7th Cir. 1984); *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 590 (7th Cir. 1984). As explained in *Leaseways*, the heart of the four factor test is a comparison of the likelihood and gravity of error involved in deciding whether or not to award the injunction. The greater the probability of success, the less likelihood of error. The greater the harm in the event relief is denied and the more the balance of harm favors the movant, the more serious the error in denying injunctive relief. As further elaborated in *Roland*, the factors are interdependent: the greater the likelihood of success, the less heavily need the balance of harms weight in favor of the movant; the less likely the plaintiff is to win, the more need the balance of harms support it. 749 F.2d at 387.

In the present case, the plaintiff has shown a "better than negligible" but less than probable chance of success on the merits at trial. *Omega Satellite Products Co. v. City of Indianapolis*, 594 F.2d 119, 123 (7th Cir. 1982). The court has found that the agency exemption to the antitrust laws would protect American's contractual arrangements with its authorized agents, and in order to succeed, ICT would therefore have to show concerted action between American and some of its agents to put McTravel out of

business. The conspiracy evidence (on the present record) is weak.

Because plaintiff's evidence raises some question on the merits but falls short of a likelihood of success, the court turns to the balance of harms to see whether plaintiff should nonetheless be entitled to injunctive relief. If the preliminary injunction requested by plaintiff is not granted, American presumably would persist in its decision not to issue McTravel an American validation plate because of McTravel's public promotion of rebates, thereby making it impossible for McTravel to write tickets for travel on American. ICT Vice President Richard Dickieson has estimated that prior to American's actions against McTravel in August 1985, sales of American seats amounted to 30% of ICT's and McTravel's business, and that loss of this business would "effectively put" McTravel out of business.

In *Leaseways*, Judge Posner indicated that the loss of four out of seventeen franchises showed irreparable harm given the difficulty of proving lost profits. In *Roland*, by contrast, Judge Posner found that a loss of 10% of a distributor's business was not significant. 749 F.2d at 391. Obviously, a travel agent is different from the distributors in both *Roland* and *Leaseways* because to sell any product to a client it may be necessary to book a client on an American flight. In the present case, plaintiff has shown that it will suffer a significant loss of good will in its ability to service the public, because 99 plus per cent of all travel agents are authorized to book for all airlines. However, the plaintiff has offered only conclusory allegations to support its statement that loss of American's business "would effectively put it out of business."

McTravel did not begin business until January 1985. McTravel's marketing concept is new, and apparently has high potential for success. Other travel agents have begun to advertise and American has written cease and desist letters to them. Plaintiff admitted on closing argument

that other major carriers had withdrawn earlier threats to terminate McTravel due to its advertising. (Apparently these other airlines have an anti-advertising policy similar to American's.) American has presented evidence that there is no route out of Chicago where American is the only carrier (although the times at which the various airlines fly vary). Plaintiff should be able to avoid many losses by sale of travel on other airlines. The court believes that most consumers willingly would give up travel on American in order to obtain lower air fares, and that plaintiff's fears of going out of business are overstated.

On the other hand, if American's actions ultimately are found to be legal, imposing an injunction now could significantly harm American's nationwide distribution policies. If McTravel is awarded its preliminary injunction, American will be forced to live with the fact that its agents are placing advertisements which it reasonably believes will undermine the credibility of its promotional and pricing campaigns. Considering this balance of harms, the court finds that an injunction, if wrong, would harm American more than the erroneous denial of an injunction would harm McTravel. American's losses due to displacement of its commission policy would be more difficult to quantify than McTravel's loss of commissions on American flights for which no booking could be made on another carrier. Certainly when considering the weak evidence of conspiracy, the balance of harms must be weighed against issuance of a preliminary injunction.

Consideration of the status quo also persuades the court to deny plaintiff's motion for a preliminary injunction. In the present case, plaintiff is asking court to modify the status quo so that McTravel can pursue an aggressive marketing strategy which is arguably harmful to American's interest. Were McTravel an established business which American was seeking to drive from competition, the equities might be different. McTravel, however, has never been an authorized American travel agent. In the

present case, the status quo can best be preserved by allowing American to enforce its contractual rights while McTravel continues to test the viability of its marketing method through business with other carriers. The decline in business McTravel suffers due to American's refusal to deal can be quantified, and plaintiff's antitrust damages, if proven, will be an adequate remedy.

Accordingly, the motion for a preliminary injunction is denied. It is so ordered.

/s/ Susan Getzendanner
Susan Getzendaner
United States District Court

September 16, 1985

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 85 C 07079

ILLINOIS CORPORATE TRAVEL, INC.
d/b/a McTRAVEL TRAVEL SERVICES,
Plaintiff,

v.

AMERICAN AIRLINES, INC.
Defendant.

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This antitrust case is before the court on the plaintiff's motion to reconsider and set aside the court's September 16, 1985 memorandum opinion and order denying plaintiff's motion for a preliminary injunction. Although the case has now been reassigned to Judge Brian Duff, I offered to rule on the motion in order to avoid the necessity of reconvening any evidentiary hearings, and Judge Duff agreed by order dated December 6, 1985. Plaintiff raises two arguments: 1) that the court erred in balancing the hardships of the parties; and 2) that the court improperly applied common law agency principles to plaintiff's allegations of resale price maintenance.

1. Balance of Hardships

Plaintiff raises two distinct arguments concerning the balance of hardships. First is that the court erred in characterizing plaintiff's estimates of harm as "conclusory."

Second is that the court unfairly relied on American's claims of harm to its distribution system when plaintiff was precluded from investigating and exposing the weaknesses of those claims at the preliminary injunction hearing. Neither argument seems to the court persuasive grounds for reconsideration.

Plaintiff's evidence of irreparable harm consists almost entirely of opinion evidence from its president Richard Dickieson not that it will go out of business, but that it will be prevented from opening a number of additional McTravel offices through use of an admittedly novel pricing and advertising system. As Dickieson set forth in his affidavit, McTravel is both a "recent entrant into the travel agency business" and the "first" travel agency to promote the discount travel concept. (Dickieson Aff. ¶¶ 26-27). While current losses due to delays in this strategy are clearly difficult to quantify, the fact remains that what McTravel seeks by an injunction is not a preservation of the status quo, under which American's travel agencies are not allowed to advertise rebates, but a chance to capitalize on a newly competitive market. Thus, while McTravel's injuries are "irreparable" in the sense that they are difficult to quantify, the chief losses of which McTravel complains involve benefits not presently enjoyed.

Plaintiff vigorously argues that granting an injunction would preserve rather than alter the status quo since McTravel, while not an authorized American agent, was nonetheless authorized under its ARC agreement to issue American tickets by using the imprint plates of other carriers with which American has a bilateral ticketing arrangement. The flaw in this argument is that at no time until just before this suit did McTravel make national efforts to promote its rebating policies. (A chief example would be the promotional spots on "Good Morning America.") While permitting McTravel to continue issuing American tickets would in part preserve the status quo, permitting McTravel to issue such tickets while pursuing

an aggressive marketing strategy would greatly alter the status quo.

For similar reasons, the court rejects plaintiff's contention that reliance on American's harm was erroneous. In weighing the relative hardships between American and McTravel, the court was not opining that the injunction would economically diminish American's business. Had the court done so, plaintiff would be correct to complain that evidentiary rulings impaired its ability to refute American's claims. My point, however, was that any legitimate interest American had in maintaining its distribution system would be irreparably lost were McTravel allowed to pursue its aggressive new strategies. The court's use of the word "harm" was apparently misleading, but was based on McTravel's claims that its new marketing would revolutionize the travel agency business. Taking those claims of success as correct, to grant the preliminary injunction would, as a practical matter, moot the entire controversy by requiring American to change its distribution system whether that system is lawful or not. The court therefore adheres to its conclusions about the relative balance of hardships, absent a strong showing of success on the merits.

2. Probability of Success

Plaintiff makes two related arguments in favor of reconsidering the court's assessment on the merits of the case: first that the court erroneously found McTravel to be an "agent" of American under common-law principles and second that common-law agency analysis is in any event inappropriate for antitrust analysis. In support of the first argument, plaintiff cites two cases, both presented to the court for the first time on this motion, which hold that a travel agency is not an "agent" of the airline for bankruptcy related purposes. In *In re Shulman Transport Enterprises, Inc.*, 744 F.2d 293 (2d Cir. 1984), Pan American Airlines attempted to assert a priority over proceeds

held by an international freight forwarder which had filed for Chapter 11 protection. The court rejected the argument that the debtor held the proceeds of the air space sales in the fiduciary capacity of an agent, and thus held that the debtor's secured lender had priority over the airline to the funds. The court laid particulr stress on the airline's lack of control over the debtor's collection of funds. *Id.* at 295.

The other case, *In re Morales Travel Agency*, 667 F.2d 1069 (1st Cir. 1981), involved a similar situation: Eastern Airlines attempted to claim immediate possession of funds held by a bankrupt travel agent on the ground that the funds represented proceeds of its sales. Notwithstanding language in the governing trade agreement that such proceeds were property of the airline to be held in trust, the court noted that the travel agent nowhere segregated the proceeds of airline sales from its general funds, and held the relationship to be one of debtor-creditor rather than one of trust. *Id.* at 1071-72.

Assuming that the facts in *Shulman* and *Morales* are fully applicable here,[1] it still does not follow as a matter of law that defendant's ban on the advertising of rebates is per se illegal. Both *Shulman* and *Morales* were concerned with the ostensible ownership problems created when a travel agent commingles funds collected for particular carriers in its general accounts. Those cases theoretically have little application to the agency inquiry under antitrust law, which is couched in terms of whether a given consignment masks an unlawful *resale* price maintenance scheme. Here, the function of travel agents is to act as

[1] The Airlines Reporting Corporation (ARC) agreement which governs American's relations with plaintiff provides a Section VII-B that ICT shall designate a bank account for the benefit of ARC and the carrier to hold the proceeds from sales of air transportation. The court has assumed that this language does not require ICT to designate separate bank accounts for each carrier. If this assumption is erroneous, however, *Shulman* and *Morales* might be factually distinguishable.

mere conduits through whom American sells directly to customers, not resellers, and the agency inquiry holds.

Plaintiff secondly argues that application of common-law agency principles was in any event improper. Plaintiff relies in its brief chiefly on *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), in which the Supreme Court made clear that the formalities of consignment relationships, such as passage of title, may not be used to avoid antitrust liability for an otherwise unlawful resale price maintenance scheme. Plaintiff interprets *Simpson* to require a finding that the agent lacks independence and is in effect little more than an employee before a court can find an agent's lack of pricing authority to be a lawful attribute of a true consignment relationship.

Plaintiff's interpretation is borne out in many cases which stress an agent-plaintiff's lack of entrepreneurial independence as one basis for finding no resale price maintenance in a particular fixed price consignment. *See, e.g., Holter v. Moore & Co.*, 702 F.2d 854 (10th Cir.), *cert. denied*, 464 U.S. 937 (1983); *Hardwick v. Nu-Way Oil Co., Inc.*, 589 F.2d 806, 810 (5th Cir.), *cert. denied*, 444 U.S. 836 (1979); *American Oil Co. v. McMullin*, 508 F.2d 1345, 1351 (5th Cir. 1975); *Laurence J. Gordon, Inc. v. Brandt, Inc.*, 554 F.Supp. 1144, 1150 (W.D. Wash. 1983). However, the above courts have also interpreted *Simpson* not to invalidate all fixed price consignment relationships, but simply to require courts to examine the substance of a purported consignment relation in determining whether the consignment is bona fide or not. This examination involves many factors, particularly whether the agent bears the risks of the distribution process. *See, e.g., Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 343 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983); *Hardwick*, 589 F.2d at 809; *Pogue v. International Industries, Inc.*, 524 F.2d 342, 345 (6th Cir. 1975); *Greene v. General Foods Corp.*, 517 F.2d 635, 653 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *Laurence J. Gordon, Inc.*, 554 F.Supp. at 1150. Travel

agents assume no risk of loss due to unsold air space, and the court relied chiefly on that lack of risk in finding a true consignment relationship to exist.

Even assuming that entrepreneurial independence is the true litmus test for vertical price restraints under *Simpson*, plaintiff's status as an independent business entity does not control the question of its agency status with respect to the purchase and sale of American tickets. Just as a so-called agent may act in that capacity as to some matters but not others, *In re Shulman Transport Enterprises, Inc.*, 744 F.2d 293, 295 (2d Cir. 1984), so may an otherwise independent business entity be a mere agent with respect to certain activities. *See, e.g., Hardwick*, 589 F.2d at 809-810 (store owner, although an independent operator in many respects, held an agent with respect to sale of gasoline from pump outside store).

Application of this principle to the present case produces mixed results. McTravel, while clearly not an "employee" of American, does not bear the indicia of an entrepreneur in selling defendant's tickets: plaintiff can only negotiate a sale after checking with American that a flight seat is in fact available, does not assume the risk of unsold seats, never purchases the tickets for resale, and is not a party to the contract for the sale of the flight, which is executed as if between the airline and the customer. These factors strongly support the court's earlier analysis.

On the other hand, the customer remits payment to the travel agency in the latter's name, and the contract between American and its agents does not specify how funds should be collected. While this risk can be minimized through accepting only cash or approved credit cards, the risk of nonpayment due to customer default nonetheless remains with McTravel, not American. Unlike the risks incurred by the plaintiff in *Simpson*, however, this risk does not attach until *after* the customer agrees to purchase an airline ticket. The court therefore assumed that Amer-

ican's interest in price regulation of airline tickets would be justified by the fact that the risk of unsold tickets remains with American throughout the sales process, despite its use of outside agents instead of employees as salespeople.[2]

Plaintiff finally argues that the distinction between sales and consignment transactions has been specifically discredited for antitrust purposes in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 422 U.S. 36, 55 (1977). In *Sylvania*, the Supreme Court reversed its earlier decision in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), and held that vertical nonprice restrictions should be invalidated only under a rule-of-reason standard based on demonstrable economic effect. The court's language overruling *Schwinn* is instructive. In *Schwinn*, the court had ruled that vertical nonprice restrictions should be held *per se* unlawful where a manufacturer seeks to "restrict and confine areas or persons with whom an article may be traded after a manufacturer has parted with dominion over it." 388 U.S. at 379, quoted in *Sylvania*, 433 U.S. at 44. But the *Schwinn* court went on to state that the rule of reason governs when "the manufacturer retains title, dominion, and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer." 388 U.S. at 380, qouted in *Sylvania*, 433 U.S. at 44-45.

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[2] McTravel has also argued that the court erred in finding no true competition between the airline and the agent. While American collects less money on tickets sold by agents than tickets sold through American salespeople, it also incurs less expenses on those sales. Even assuming, however, that American has an interest in maximizing the number of sales it makes through its own offices, any competition between travel agents and sales personnel reflects the fact that the travel agents function as salesmen and not as independent distributors who purchase for resale to third parties.

The *Schwinn* decision was the subject of numerous scholarly critiques, many of them arguing that its distinction between sale and consignment transactions was essentially formalistic and unrelated to any relevant economic impact. *See* Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 Antitrust L.J. 537, 537 (1975); Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 Harv. L. Rev. 1419, 1422 (1968); McLaren, *Territorial & Customer Restrictions, Consignments, Suggested Resale Prices and Refusals to Deal*, 37 Antitrust L.J. 137, 145 (1978); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 288-89 (1975); Note, *Vertical Territorial & Customer Restrictions in the Franchising Industry*, 10 Colum. J. Law & Soc. Problems 497, 503 (1974). The *Sylvania* Court acknowledged the weight of this collective scholarship, noted that *Schwinn* provided "no analytical support" for distinguishing between sale and nonsale restrictions, and concluded that *Schwinn*'s exemption of nonsale transactions from the *per se* rule was due to the Court's unexplained belief that a complete *per se* prohibition of vertical restraints would be inflexible. 433 U.S. at 54. The Court concluded "that the distinction drawn in *Schwinn* between sale and nonsale transactions is not sufficient to justify the application of a *per se* rule in one situation and a rule of reason in the other." 433 U.S. at 57. The Court then concluded that the *per se* rule stated in *Schwinn* for nonprice restrictions, instead of being expanded to include nonsale transactions, should be abandoned in favor of a reasonableness analysis. *Id.*

Plaintiff's extrapolations from *Sylvania* can be summarized as follows. Because sale and nonsale transactions cannot be distinguished in terms of economic effect, the Supreme Court's continued *per se* condemnation of vertical price fixing must be adhered to regardless of the form in

which American runs its distribution system. This argument is certainly not without force. *Sylvania*, however, concerned the distinction between consignments and sales as systems of distribution, and did not address the continued vitality of the rule that a retailer is entitled to determine the price at which it sells its own products directly to consumers even though negotiated through outside agents. In this court's opinion, *Sylvania*'s logic should not be extended to hold *per se* unlawful an agency type sales network similar to those upheld by other courts, even after *Sylvania*, under the rule of *Simpson* and *General Electric*. *See, supra*, pages 5-6.

Significantly, none of the post-*Sylvania* cases addressing the continued vitality of the "agency" exception articulated in *Simpson* have considered the argument put forward by plaintiff. The only case to discuss *Sylvania* at all, *Laurence J. Gordon, Inc. v. Brandt, Inc.*, 554 F.Supp. 1144 (W.D. Wash. 1983), expressly reaffirms the teaching of *Simpson* that restraints imposed on individuals who do not possess entrepreneurial indicia are outside the scope of Section 1. *Id.* at 1151. In this case, while plaintiff operates as an independent business entity generally, it does not possess sufficient independence with respect to the sale of airline tickets to qualify as a reseller under antitrust analysis. The court adds, however, that this conclusion is based on the record of the preliminary injunction hearing, and is not meant to foreclose a different result after a fuller hearing on the merits.

American argues that *Sylvania* is inapt since the Court in that case actually relaxed the rules under the Sherman Act with regard to vertical restrictions, and thereby offers justification for American's prohibition of rebate advertising. While there is some cogency to this argument, and scholarly support as well, *see, e.g.*, Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L.Rev. 6, 9 (1981), the Court in *Sylvania* expressly declined to call into question the long

standing prohibition on resale price maintenance. 433 U.S. at 51 n.18. That position has since been reaffirmed. *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1469 n.7 (1984); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980). To utilize the economic arguments underlying *Sylvania* as a ground for ignoring the distinction between vertical price and non-price restrictions, would be to ignore the Supreme Court's directive in that case as well as more recent ones in which the *per se* treatment for price restrictions has been retained.

As is perhaps evident from the tone of this discussion, the plaintiff's motion for reconsideration has raised more questions than it has answered. Plaintiff has raised some factual issues which might justify a different result on the agency issue at trial, and plaintiff has raised some cogent arguments for challenging the validity of the agency inquiry itself, but has not convinced the court that its prior analysis was wrong. The court thus adheres to its view that the probability of success is sufficiently unclear to justify an injunction. In reaching this result, the court stresses its belief that the probable effect of an injunction would be to disrupt the way American currently does business without a clear finding of liability, whereas the chief effect of an erroneous denial would be to increase plaintiff's burden of proving damages, but not to eliminate such recovery.

Accordingly, the motion for reconsideration is denied.

It is so ordered.

/s/ Susan Getzendanner
Susan Getzendanner
United States District Judge

January 8, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 86-1201

ILLINOIS CORPORATE TRAVEL, INC., d/b/a McTravel Travel Services,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellee.

Argued Sept. 16, 1986.

Decided Nov. 19, 1986.

David M. Stahl, Isham, Lincoln & Beale, Chicago, Ill., for plaintiff-appellant.

Steven C. McCracken, Gibson, Dunn & Crutcher, Newport Beach, Cal., for defendant-appellee.

Before BAUER, Chief Judge, and FLAUM and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

American Airlines does not allow McTravel Travel Services to write tickets good for travel on American, because McTravel will not agree by contract not to advertise discounts. McTravel wants to let people know that it will rebate part of a travel agent's usual 10% commission. American's policy is functionally a price restriction. See *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961); cf. *Catalano, Inc. v. Target Sales, Inc.*, 466 U.S. 643, 649, 100 S.Ct. 1925, 1928-29, 64 L.Ed.2d 580 (1980). This led to McTravel's claim that American

has violated the *per se* prohibition against resale price maintenance established by *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-09, 31 S.Ct. 376, 383-85, 55 L.Ed. 502 (1911), and reaffirmed in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03, 100 S.Ct. 937, 941-42, 63 L.Ed.2d 233 (1980). See also *Monsanto Co. v. SprayRite Service Corp.*, 465 U.S. 752, 761 n. 7, 104 S.Ct. 1464, 1469-70 n. 7, 79 L.Ed.2d 775 (1984).

The district court declined to issue a preliminary injunction, however, concluding that plaintiff McTravel and other "travel service companies" are genuine agents. Ever since *United States v. General Electric Co.*, 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926), the agency relation has been outside the *per se* rule of *Dr. Miles*. The district court thought that *General Electric* doomed most of McTravel's antitrust arguments as a matter of law. The only possible exception, according to the district court, would arise if there had been "concerted action between American and some of its agents to put McTravel out of business." After reviewing evidence on this score, the district judge concluded that there was no direct support for a conspiracy; as for the inference of a conspiracy, the district court wrote: "The conspiracy evidence (on the present record) is weak." The court then concluded that McTravel would not suffer sufficient irreparable harm pending a trial on the merits to justify an injunction in the face of its "weak" case on the merits.

Because a district court has substantial discretion to evaluate the "equity" factors in passing on motions for preliminary injunctions, see *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429 (7th Cir.1986); *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589 (7th Cir. 1986); McTravel has devoted most of its effort on appeal to an argument that the district court incorrectly assessed its probability of success on the merits. It seeks to bring the case within a rule of *per se* illegality. Amer-

ican does not deny that it has refused to allow McTravel to write tickets if it also advertises discounts. If this admitted policy is illegal *per se*, then the district judge surely abused her discretion in denying McTravel's request for preliminary relief. We therefore take up the argument that American's policy is unlawful *per se*. McTravel pursues its claim in three ways: arguing that *Dr. Miles* applies, that there was a conspiracy to evict McTravel from the market, and that American's program so obviously injures consumers that it should be deemed illegal *per se* even if *Dr. Miles* does not apply directly.

McTravel's principal argument is that *General Electric* died an unnatural death at the hands of *Simpson v. Union Oil Co.*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964). Before the case was argued, however, we concluded in *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir.1986), that *General Electric* is healthy. Employment relations do not violate the antitrust laws; Sears may tell the managers of its stores at what price to sell lawn mowers. *Morrison* held that genuine agency relations should be treated like employment relations. The owner of a house may tell the real estate agent the minimum price the owner will accept without committing a *per se* offense. What *Simpson* held, we concluded, is that a manufacturer may not avoid *Dr. Miles* by giving the name "agent" to one who serves the same economic functions as an ordinary wholesaler or retailer. The appropriate inquiry, according to *Morrison*, is "whether the agency relationship has a function other than to circumvent the rule against price fixing." 797 F.2d at 1436.

Counsel for McTravel conceded at oral argument that if this language in *Morrison* establishes the legal test, then it loses on its *per se* argument. The concession was well advised, because the district judge's thorough findings demonstrate that the relation is a genuine agency. Travel service operators do not resell air travel. We set out some of the district court's findings.

An air carrier establishes and announces to the public a price for its service. The airline determines the number and destination of flights and the equipment to be used on each. A traveler may reserve seats directly from the airline or through a travel agent; in either case the reservation is likely to be made on a computer that records the number of seats remaining on a flight and the price of each. The travel agent must obtain the airline's clearance (by computer) to book a flight. The agent does not purchase a seat for resale and does not hold an inventory of seats. (Some seats are purchased for resale, usually on charter flights but increasingly on other flights. We do not deal with seats purchased outright by travel service operators.) The airline or any agent in the country can sell the same seat. It remains available until reserved—and sometimes even after, for air carriers "overbook" to deal with no-shows. The traveler with a ticket goes to the airport and is served directly by the airline. If the traveler does not show up, the seat may fly empty and the airline loses the sale. (Some tickets have cancellation charges, a detail that does not affect the analysis.) The travel service operator takes no risk of unfilled seats or of the many problems, from mechanical difficulties to weather, that may make the airline unable to deliver transportation as promised. The airline takes all credit risks on the credit cards it accepts. True, as McTravel argues, that travel agent loses its commission when the traveler does not show and has his ticket refunded, but this is true of any agent when a sale falls through. The relation of travel agent to airline is not substantially different from the relation of broker to real estate owner, of brokerage house to investor, or of travel agent to hotel, rental car company, or other provider of travel services.

The district court concluded from these facts that travel service operators are genuine agents within the meaning of *General Electric*. This conclusion is amply supported by the record. McTravel therefore sought at oral argument

to persuade us to alter the standard articulated in *Morrison*. It contended that the standard makes liability turn on the intent of the parties adopting the arrangement. Counsel accurately observed that this court has been skeptical about "intent" tests in antitrust law. E.g., *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 379-80 (7th Cir.1986); *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1338-39 (7th Cir.1986). See also VII P. Areeda, *Antitrust Law* ¶ 1506 (1986). Intent is a slippery issue, because firms may "intend" to harm rivals or acquire monopolies even though their practices, objectively viewed, are beneficial to consumers, "whose interests the [Sherman Act] was especially intended to serve". *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 15, 104 S.Ct. 1551, 1560, 80 L.Ed.2d 2 (1984). We do not believe, however, that the standard in *Morrison* requires reference to the mental states of the parties. "[T]he agency relationship has a function other than to circumvent the rule against price fixing" (797 F.2d at 1436) when, objectively viewed, the arrangement serves one of the economic functions of agencies in general, such as apportioning risk to the firm best able to bear risk, or lodging pricing decisions in the firm best able to gauge market conditions. In *Morrison* itself the court found that a food broker is an agent because the principal is in the best position to evaluate market conditions and decide on an optimal selling strategy, 797 F.2d at 1437-38, not because of subjective intent. The same objective approach here supports the district judge's conclusion that McTravel is an agent of airlines and not a reseller. This means that the *per se* rule of *Dr. Miles* does not apply. (Of course, conclusions that depend on the record complied so far might be altered if additional facts adduced at trial show that the district court has mischaracterized the nature of the relation between airlines and travel service operators. Here and elsewhere, we speak

only of the conclusions drawn on the basis of the existing record.)

McTravel's second argument in support of *per se* treatment is based on horizontal collusion among dealers, usually a firm footing for *per se* analysis. McTravel contends that American conspired with other travel agents to cut off competition from an upstart with a novel way of doing business. (McTravel does not allege that there is a conspiracy among airlines.) We agree with the district court that American and its agents are not the same firm for purposes of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). Collaboration among dealers orchestrated through American therefore might establish a *per se* violation. The record does not contain an explicit agreement, however; it must be inferred, if it can be shown at all; the district court thought the evidence in support of such an inference "weak", and this is an appropriate characterization.

The Supreme Court held in *Monsanto* and reiterated in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ___ U.S. ___, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986), that to show conspiracy indirectly the plaintiff must demonstrate that the firm is behaving in a way that is inconsistent with unilateral decisionmaking. See also, e.g., *Garment District, Inc. v. Belk Stores Services, Inc.*, 799 F.2d 905, 908-11 (4th Cir.1986); *Souza v. Estate of Bishop*, 799 F.2d 1327, 1329-30 (9th Cir. 1986). This means showing that the defendant acted in a way that, but for a hypothesis of joint action, would not be in its own interest. See also *Morrison*, 797 F.2d at 1439-40; *Westman Commission Co. v. Hobart International, Inc.*, 796 F.2d 1216 1222-25 (10th Cir.1986); *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212, 1217-18 (5th Cir. 1986); Liebeler, *Intrabrand "Cartels" Under* GTE Sylvania, 30 U.C.L.A.L.Rev. 1 (1982). If the evidence is consistent with the hypothesis that the firm at the top of the

vertical chain designed the restrictions for its own purposes, an inference of conspiracy is inappropriate.

In any chain of distribution discussions of price will be frequent—and as *Monsanto* pointed out, beneficial too. 465 U.S. at 762-64, 104 S.Ct. at 1470-71. Concerns about free riding by discount travel agents, which we discuss below, may have led American to adopt its policy no matter what the agents thought or wanted. Consequently, it cannot be thought "clearly erroneous" for the district court to conclude that McTravel is unlikely to establish conspiracy here. Evidence that American discussed both price and McTravel with other agents does not support an inference of conspiracy. The usual "conspiracy" argument in a vertical restraints case is that the manufacturer is a cat's paw of "full price" retailers trying to maintain their prices. In this case, by contrast, McTravel complains that American has snubbed it in order to please other big discounters among its agents. There is no plausible anti-consumer reason why American would promote some discounters over another. The district court was entitled to think McTravel unlikely to prevail, at least on the record developed so far.

Much of McTravel's remaining argument asks us to put aside formal labels and turn directly to what McTravel believes is the adverse effect of American's rule on consumers. This is the sort of short form or quick look Rule of Reason analysis endorsed in *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 & n. 42, 104 S.Ct. 2948, 2965-66 & n. 42, 82 L.Ed.2d 70 (1984). See also VII Areeda at ¶ 1508. McTravel argues that American's demand that travel agents not advertise price reductions injures consumers by forcing them to pay higher prices. Because the antitrust laws are designed to assist consumers, see *Olympia Equipment*, 797 F.2d at 375 (collecting cases), *Westman Commission*, 796 F.2d at 1220, McTravel concludes that American's efforts to squelch the discounting should be forbidden.

This is a short-run view, however. Any form of vertical restraint affects prices, as the Supreme Court emphasized in *Monsanto*. The question is not whether the arrangement affects moment-to-moment rivalry in a way that raises today's prices, but whether this effect is associated with potential benefits to consumers that are worth the price. Higher quality may come with higher prices. The antitrust laws do not adopt a model of atomistic competition that condemns all organization; otherwise they would forbid Sears to tell the managers of its stores what prices to charge. Organization may be beneficial; there is little production in a world without organization. The question is how much organization is optimal from consumers' perspective, see *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C.Cir.1986), and fixation on the short run effects on price is unlikely to yield a useful answer to such a complex question.

Both American Airlines and travel agents sell tickets for American's flights. American apparently wants all agents to charge the same price it does. A few years ago it abandoned efforts to enforce this rule, because agents were giving disguised discounts. They could, for example, sell a package of air travel and hotel space at a bargain, claiming that they had collected the full commission on the air travel but rebated the commission on the hotel room. (This illustrates how tie-in sales can be used to give secret discounts. See *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 491 F.Supp. 1199 (D.Hawaii 1980), aff'd, 732 F.2d 1403 (9th Cir. 1984).) American then adopted its no-advertising rule, which is easily enforceable because advertising of discounts is observable. McTravel ran afoul of American's policy by advertising a fixed price for its services. It collects $8 for making a reservation and $7 for issuing a ticket, a total of $15 if the traveler uses both services. McTravel rebates to customers the difference between its price and the usual

10% commission. This will be attractive when the ticket's price exceeds $150.

The discount pricing structure supports McTravel's argument that it is doing a favor for consumers. But the question of characterization—whether for purposes of *per se* analysis or under the "quick look" version of the Rule of Reason—is not whether the plaintiff is a discounter. It is whether the practice at issue "facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562-63, 60 L.Ed.2d 1 (1979), quoting from *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16, 98 S.Ct. 2864, 2875 n. 16, 57 L.Ed.2d 854 (1978). Unless the practice "almost always" makes consumers worse off, it is not subject to condemnation without more detailed study of its effects—including proof of market power and actual injury. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 314-17 (8th Cir.1986).

GTE Sylvania observed that arrangements among firms in a vertical chain of supply often may be beneficial to consumers. 433 U.S. at 51-57, 97 S.Ct. at 2558-61. *Monsanto* also observed that price and non-price arrangements alike may produce these benefits. 465 U.S. at 762, 104 S.Ct. at 1470. Non-price arrangements, such as exclusive territories, may lead to higher prices; price arrangements, such as setting an agent's price, may induce agents to supply extra services that consumers desire. Non-price arrangements now are judged under the Rule of Reason. If there is no inevitable difference between price and non-price rules—if there is not, indeed, even a bright line separating the two, as this case shows in treating an advertising rule as a price rule, and see, e.g., *Jack Walters &*

Sons Corp. v. Morton Building, Inc., 737 F.2d 698, 706-07 (7th Cir.), *cert. denied*, 469 U.S. 1018, 105 S.Ct. 432, 83 L.Ed.2d 359 (1984); *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883, 885-86 (1st Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 112, 58 L.Ed.2d 128 (1978); Liebeler, *1983 Economic Review of Antitrust Developments: The Distinction Between Price and Nonprice Distribution Restrictions*, 31 U.C.L.A.L.Rev. 384 (1983)—then there is no good argument for expanding either the *per se* rule or a summary version of the Rule of Reason to additional forms of vertical arrangement, as McTravel wishes us to do. *Dr. Miles* is not the model for the classification of new business arrangements.

American's prohibition of McTravel's price advertising does not call for summary condemnation at the preliminary injunction stage of this litigation. It does not "always or almost always" work to consumers' detriment. American has no particular reason to cram unwanted money down the throats of travel agents. If travel agents are charging too much for their services, why does American not reduce the commission and thereby angle for passengers with lower net prices at no cost to itself? It must be purchasing some sort of valuable service from these travel agents. Many thoughtful people believe that vertical restraints are as a rule beneficial to consumers and ought not be condemned lightly or ever. E.g., Bork, *Vertical Restraints: Schwinn Overruled*, 1977 Sup.Ct. Rev. 171; Butler & Baysinger, *Vertical Restraints of Trade as Contractual Integration*, 32 Emory L.J. 1009 (1983); Hay, *Vertical Restraints After* Monsanto, 66 Cornell L.Rev. 418 (1985); Liebeler, *1983 Economic Review, supra*; Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U.Chi.L.Rev. 6 (1981); Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86 (1960). The Supreme Court was receptive to such thoughts in *GTE Sylvania, Monsanto*, and *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d

1042 (1982). When a new vertical restraint comes before a court, then, the appropriate response is not automatic condemnation but consideration whether the practice has a potential for harm (which includes an inquiry into market power) and, if there is such a potential, whether there are also potential benefits for consumers. See *Rothery Storage* and *Westman Commission*, among the many recent cases in other circuits adopting this approach. See also *Business Electronics*, 780 F.2d at 1221-22 (Jones, J., concurring).

American has raised some potential benefits of its practices. It has expressed concern about free riding by discount agents on the work of other agents or American itself. See *GTE Sylvania*, 433 U.S. at 53-57, 97 S.Ct. at 2559-61, and *Monsanto*, 465 U.S. at 762-63, 104 S.Ct. at 1470. Some agents may offer thorough counselling to travelers, and American offers an information and reservations service by phone and at offices in large cities. Travelers might frequent these full-service agencies, make reservations, and then pick up their tickets at McTravel for 90% of the price plus $7. The siphoning of business would prevent full-service agents, and American itself, from recovering the costs of what may be an expensive process of giving advice and making the reservation. (McTravel itself believes that the cost to make a reservation is $8, and agencies that do more may incur higher costs.) If McTravel cannot draw attention to its unbundled prices—or if all agents charge the same price—then agents may compete for business by offering better service. Customers who use American's (or a given agent's) reservation service have no incentive to go elsewhere to pick up their tickets; American and its agents therefore are compensated for their services and will provide the level of service that travelers prefer. See *Westman Commission*, 796 F.2d at 1226-27.

This explanation shows that American's rule may be beneficial to customers. That is enough to establish that summary denunciation is inappropriate. If we were to bring

this agency relation within the scope of a bobtailed *per se* rule, the effect would be the same as if *Simpson* had indeed overruled *General Electric*. Courts have long believed that once a relationship is a *genuine* agency, the manufacturer or supplier has the same uninhibited power to set the agent's price that he has to set the price to be charged by an employee. An appeal from the denial of a preliminary injunction is not the time to upset this long-held position.

We emphasize once more the narrow scope of our review. The district court has not found that American's practices are beneficial to consumers or are lawful; neither do we. There has not been a trial, and the district judge has not made findings on the subject. It is not appropriate to foreclose an argument that American could have made less restrictive arrangements. It might, for example, unbundle its prices. American could reduce to (say) $7 the commission it pays to an agent that does nothing but issue a ticket against a reservation made by someone else. On the other hand, this might complicate the reservations system, requiring separate computer entries for the reserving agent and the issuing agent. Whether unbundling is cost-justified ordinarily is a matter to be determined by competition in the market, not by judges.

We do not imply that defendants must justify their conduct; to the contrary, plaintiffs in antitrust, as in other parts of the law, bear an initial burden of showing that the conduct in question is probably harmful. Only then need the defendant supply a justification. *Rothery Storage*, 792 F.2d at 229 n. 11. When the arrangement in question is a traditional one such as employment or agency, that burden is particularly steep. Perhaps price arrangements in agency relations are best deemed lawful *per se*, as employment arrangements are and as courts have assumed to date is the inevitable effect of a finding of agency. We need not pursue the possibility. Our point is that so far McTravel has not reached first base. The district court

was therefore entitled to find that McTravel's chances of success on the merits are slight.

This conclusion means that we can follow the district court's example and discuss irreparable injury only briefly. American's market share of air transportation is less than 15%. United, which carries 16% of the nation's air traffic, does not prohibit advertising of discounts. So far as the record shows, most of the industry follows United rather than American. Texas Air (Continental, Eastern, New York Air), which just became the largest carrier at 17%, is an aggressive price cutter. Agents and customers therefore are not at American's mercy—or so the district judge was entitled to conclude. Although McTravel argues that American's share of traffic at Chicago exceeds 20% and that an agent must be able to write tickets for all carriers to be successful, which magnifies American's market power and the irreparable injury, the record does not show how McTravel has done without being able to write for American. Perhaps its unusual method of setting prices will attract business and overcome the disadvantage of limited agency. The district judge thought this a possibility, and we defer to her judgment in assessing such matters at the preliminary injunction stage. See *Lawson Products*, 782 F.2d at 1433-34; *American Hospital*, 780 F.2d at 593-94; see also *Ball Memorial Hospital*, 784 F.2d at 1333-34. It is enough for now that we concur in the district court's conclusion that McTravel is unlikely to prevail on the merits. That supports the denial of a preliminary injunction. Whether American has market power and whether the anti-ad rule harms consumers by restricting output are questions for the district court in any further proceedings that may be appropriate under the Rule of Reason.

AFFIRMED

FLAUM, Circuit Judge, concurring in the judgment.

The role of a circuit court reviewing the denial of a preliminary injunction is limited. The reviewing court is

to determine whether or not the court below abused its discretion in declining to issue the injunction. *See Lawson Products v. Avnet*, 782 F.2d 1429, 1438 (7th Cir.1986); *American Hospital Supply v. Hospital Products*, 780 F.2d 589, 594 (7th Cir.1986). While the majority notes the limits that should constrain its review, I am compelled to conclude that its opinion goes beyond the limits with which it seeks to comply. I also write separately because the majority advances views, which we are not called upon to offer, that appear to conflict with current decisions of the Supreme Court. Therefore, I respectfully cannot join in its opinion.

The majority focuses on the merits of McTravel's claim. That emphasis, I believe, is not required. In reviewing a denial of a preliminary injunction, this court must make three determinations. First, we must determine whether the district court employed the correct preliminary injunction standard. Second, we must review whether in deciding the "threshold" questions—the adequacy of the movant's remedy and law, the danger of irreparable harm, and the existence of some likelihood that the movant will succeed on the merits—the trial court made correct legal determinations and factual findings that were not clearly erroneous. Finally, we must consider whether the district court abused its broad, equitable discretion in its weighing and balancing of the relevant factors. *See Lawson*, 782 F.2d at 1433, 1436-39.

The district court found that McTravel had met its threshold burden of demonstrating that it had some possibility of succeeding on the merits. *Illinois Corporate Travel v. American Airlines*, No. 85 C 07079, slip op. at 19 (N.D.Ill. Sept. 16, 1985) [Available on WESTLAW, DCTU database] (Memorandum and Order). This was easily done. All McTravel needed to do was to prove that its " 'chances [were] better than negligible,' " *Roland Machinery v. Dresser Industries*, 749 F.2d 308, 387 (7th Cir. 1984) (citation omitted). Notwithstanding its finding that

McTravel had met its threshold burden, the district court declined to issue the preliminary injunction. This was because the court found that McTravel had not demonstrated that irreparable harm would result without the injunction, *Illinois Corporate Travel*, slip op. at 22, and because the court concluded that the balance of the equities weighed in American's favor, *id.* at 19-21.

Had the district court declined to issue the injunction because it believed that McTravel has shown *no* possibility of success on the merits, the majority's detailed assessment of the merits might be appropriate. However, because the court found for the plaintiff on the issue of possible success, our review should focus on the issues that made a difference—the court's evaluation of irreparable harm and its balancing of the equities.

The majority uses the correct approach in assessing the district court's finding of no irreparable harm. *See supra* at 729. That finding, standing alone, is enough to uphold the decision of the court below. *See Lawson*, 782 F.2d at 1443.

I do not agree with the majority's approach to reviewing the balance of the equities. The majority states that if American's policy "is illegal per se, then the district judge surely abused her discretion in denying McTravel's request for preliminary relief." *Supra* at 724. The majority uses this observation as a vehicle for its detailed consideration of the strength of McTravel's claims. We have made clear previously that "the ultimate evaluation and balancing of the equitable factors is a highly discretionary decision and one to which this court must give substantial deference." *Lawson*, 782 F.2d at 1437. Consequently, our review of a trial court's use of its equitable discretion will normally not prove justification for this court to review the entire spectrum of contested issues raised by a plaintiff's complaint.

We will have ample opportunity to review the factual and legal issues in this case if it comes to us on appeal following a final order. At that point we will have the benefit of a complete record and the full input of opposing counsel. *See Thornburgh v. American College of Obstetricians*, ___ U.S. ___, 106 S.Ct. 2169, 2176-77, 90 L.Ed.2d 779 (1986) ("[A] court of appeals ordinarily will limit its review [of the denial of a preliminary injunction] to abuse of discretion" except where the legal issues are "clear" and "the facts are established or of no controlling relevance.").

In light of the above, it would be inappropriate for me to engage in a protracted discussion of the merits of the plaintiff's claims. However, I must express reservation about the majority's suggestion, although only *dicta*, that the alleged vertical price restraint at issue here is to be evaluated under a Rule of Reason standard. This issue, it should be noted, was not discussed by the parties in their briefs or at oral argument. The Supreme Court has recently reconsidered, and refused to abandon, its position that resale price maintenance should be judged under a *per se* standard. *See Monsanto Co. v. SprayRite Service Corp.*, 465 U.S. 752, 761 n. 7, 104 S.Ct. 1464, 1469 n. 7, 79 L.Ed.2d 755 (1984); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 51 n. 18, 97 S.Ct. 2549, 2558 n. 18, 53 L.Ed.2d 568 (1977). The Court may alter its view in the future. However, until it does, we are not free to depart from long-standing precedent.

Turning, briefly, to the issues actually before us on this appeal, it is not entirely clear from the record produced below that the district court applied the appropriate preliminary injunction standard.[1] Nonetheless, I conclude that,

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[1] The district court may have interpreted our cases to require that it reach its decision solely by determining whether McTravel's probability of success balanced against the harm it would suffer if the court denied the injunction exceeded American's probability of success bal-

as a matter of law, the district court was correct in concluding that the plaintiff had some possibility of succeeding on the merits and that it did not abuse its broad discretion in its balancing of the equities between the parties. For that reason, I concur in the judgment of the court.

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anced against the harm that it would suffer were the injunction granted. While a district court has discretion to consider these factors as part of its effort to weigh the equities, it is not required to do so. This circuit continues to adhere to the traditional equitable doctrines governing preliminary injunctions. We have not adopted "a new legal standard . . . intended . . . to force analysis into a quantitative straight jacket," *American Hospital Supply*, 780 F.2d at 593.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 85 C 7079

ILLINOIS CORPORATE TRAVEL INC. d/b/a McTravel Services,

Plaintiff,

v.

AMERICAN AIRLINES, INC., IVI Travel, Inc., and Travel Rite, Inc.,

Defendants.

March 17, 1988.

Malcolm H. Brooks, John P. Ryan, Jr., Steve B. Varick, McBride, Baker & Coles, Chicago, Ill., for plaintiff.

Russell M. Pelton, M. Patricia Chapin, Peterson, Ross, Schloerb & Seidel, Chicago, Ill., Steven C. McCracken, Gibson, Dunn & Crutcher, Newport Beach, Cal., Alan H. Silberman, Jay Conison, Sonnenschein, Carlin, Nath & Rosenthal, Mark L. Yeager, David J. Marx, Jr., McDermott, Will & Emery, Chicago, Ill., for defendants.

MEMORANDUM OPINION

BRIAN BARNETT DUFF, District Judge.

Counts IV, V, and VI of Plaintiff's First Amended Complaint allege that Defendant American Airlines ("defendant") violated Illinois statutory and common law by refusing to allow plaintiff to advertise and sell to the general public tickets at discounted prices for American Airlines' flights, and by terminating the (alleged) contractual relationship between the two parties when plaintiff insisted on doing so. Count IV alleges a violation of the

Illinois Consumer Fraud and Deceptive Business Practices Act, Ill.Rev.Stat. ch. 121½, ¶ 261 et seq. (1985); Court V alleges tortious interference with contractual relations and intentional interference with prospective business relations; Count VI alleges breach of a contractual duty of good faith and fair dealing. Defendant has moved to dismiss these counts on the grounds that they are preempted by the Federal Aviation Act, 49 U.S.C.App. § 1305(a)(1) and, in any case, fail to state claims under Illinois law.

DISCUSSION

The Federal Aviation Act, § 105(a)(1) provides:

> [N]o state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this chapter to provide air transportation.

49 U.S.C. § 1305(a).

Courts have unanimously held that, with this provision, Congress intended to preempt all state statutes and common law rules which affect rates or services regarding air travel. *See Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C.Cir.1987); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir.1984) ("Section 1305(a)(1) preemption is not limited to those state law or regulations that *conflict* with federal law."); *Shirley Stone v. American Airlines, Inc.*, No. 86 C 5783 (N.D.Ill. Feb. 18, 1987) [Available on WESTLAW, 1987 WL 6856]. (§ 1305(a)(1) preempts both plaintiff's state law claims and state court jurisdiction); *New York Airlines, Inc. v. Dukes County*, 623 F.Supp. 1435 (D.C.Mass.1985). It did so in order to do away with "uncertainties and conflicts [in air travel], including situations in which carriers have been required to charge dif-

ferent fares for passengers traveling between two cities . . . " H.R.Rep. No. 95-1211, 95th Cong., 2d Sess. reprinted in 1978 Code and Adm.News 3737, 3751-52. *See also Wardair Canada, Inc. v. Florida Dept. of Revenue*, 447 U.S. 1, 106 S.Ct. 2369, 2372, 91 L.Ed.2d 1 (1986) (" . . . Congress has, through the [Federal Aviation] Act, regulated aviation extensively."). Thus, any state law rule of decision which could cause rates for airline tickets in one state to differ from those in other states is preempted. *Cf. Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 1914-15, 85 L.Ed.2d 206 (1985) (federal labor law preempts state contract claim founded on bad-faith because this claim requires analysis of rights and obligations arising under the collective bargaining agreement); *McCarty v. McCarty*, 453 U.S. 210, 241-42, 101 S.Ct. 2728, 2745-46, 69 L.Ed.2d 589 (1980) (Rehnquist, J., dissenting) (finding preemption is particularly appropriate where statute, by its terms, expressly states that state laws are preempted).

Counts IV, V, and VI, though brought under different Illinois substantive laws, all seek to impose liability on defendant for refusing to allow plaintiff to charge lower rates for airline tickets sold to the general public than are charged by the defendant or its other agents. Resolution of any of these counts could potentially cause the rates for airline tickets in Illinois to differ from those available in other states. Accordingly, all three are preempted by federal law.[1]

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[1] By this ruling, this court does not mean that state laws can never govern contract disputes between an airlines and its sales agents. Were Count IV grounded on an express contractual provision—i.e., that plaintiff could sell discounted tickets to the public—it might well be that plaintiff could bring an action under state law for defendant's breach of this provision. For in that case, it would not be state law that was affecting the price of the tickets, but rather the agreement of the parties. *Cf. Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). However, where the action is grounded on an (alleged) implied duty of good faith

This does not necessarily mean, however, that all three counts must be dismissed. More specifically, Count VI, though apparently intended by plaintiff to arise under Illinois contract law, could survive the instant motion if it stated a claim under the federal common law of contracts. *See Awkright-Boston Manufacturers v. Great Western Airlines*, 767 F.2d 425 (8th Cir.1985) (applying federal common law to determine liability of air agent's carrier); *Pennsylvania Bank v. Eastern Airlines, Inc.*, 731 F.2d 1113 (3d Cir.1984) (applying federal common law to determine enforceability of release value clause).

Unfortunately for plaintiff, this court concludes that Count VI fails to state a claim for breach of an implied duty of good faith and fair dealing under federal common law. Although this court does believe that federal common law imposes a duty of good faith in the performance of all contracts, *see* Restatement (Second) of Contracts, § 205, this duty did not prevent defendant from terminating its (alleged) agreement with plaintiff.

Nothing in the nature of the relationship between the two parties suggests that they reasonably expected defendant to allow plaintiff to sell airline tickets at prices below that generally charged for these tickets. *See Allis-Chalmers Corp. v. Lueck*, 105 S.Ct. 1904 at 1914-15; *Farnsworth on Contracts* § 7.17 at 526-27 (1982). Nor does plaintiff allege that defendant, in terminating its agency relationship with plaintiff, prevented plaintiff from receiving the fruits of its labors during the relationship. *See P.S. & E. Inc. v. Selastomer Detroit, Inc.*, 470 F.2d 125 (7th Cir.1972) (even in agency relationship terminable at will, there is a duty of good faith that permits agent to recoup

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and fair dealing, the determination of which requires an intertwined examination of both the expectations of the parties as well as state-imposed duties, *see Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 at 1914 n. 11, 85 L.Ed.2d 206; *Farnsworth on Contracts* § 7.17 at 526-27 (1982), the claim is preempted by federal law.

moneys laid out and time and labor spent in furtherance of plan to develop new product for principal); *Prudential Insurance Co. of America v. Crouch*, 606 F.Supp. 464 (D.C.Ind.1985) ("Pursuant to the implied covenant of good faith and fir dealing . . . , [plaintiff] and [defendant] are precluded from destroying each other's rights to premiums and commissions received or earned during the employment relationship."). Thus, plaintiff has failed to allege a breach of the duty of good faith by defendant.

CONCLUSION

Accordingly, defendant American Airlines' motion to dismiss counts IV, V, and VI of the First Amended Complaint is granted. Counts IV and V are dismissed with prejudice; Counts VI is dismissed without prejudice.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 85 C 7079

ILLINOIS CORPORATE TRAVEL, INC., d/b/a McTravel Travel Services,

Plaintiff,

v.

AMERICAN AIRLINES, INC., IVI Travel Inc., and Travel Rite, Inc.,

Defendants.

Nov. 18, 1988.

Motion to Reconsider Denied Jan. 12, 1989.

MEMORANDUM OPINION

BRIAN BARNETT DUFF, District Judge.

American Airlines gives its passengers "something special in the air." McTravel Travel Services wants to give them something special on their fares. American will let travel agencies discount tickets on American flights, so long as they do not advertise these discounts. McTravel thinks this policy violates § 1 of the Sherman Act, 15 U.S.C. § 1, as well as Illinois statutory and common law, and has thus sued American and another travel agency, IVI Travel, Inc. McTravel wants an injunction requiring American to allow McTravel to advertise discounted tickets on American flights, and monetary damages resulting from American's refusal to do so.

American won the first battle when Judge Getzendanner denied McTravel's motion for a preliminary injunction, *Il-*

linois Corporate Travel, Inc. v. American Airlines, Inc., 85 C 7079, slip op. (N.D.Ill. September 15, 1985) [available on WESTLAW, 1985 WL 2548], *aff'd*, 806 F.2d 722 (7th Cir.1986) (Easterbrook, J.), and the second when this court ruled that the Federal Aviation Act, 49 U.S.C.App. § 1305(a)(1), preempts McTravel's state law claims, *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 682 F.Supp. 378 (N.D.Ill. 1988). American and IVI now seek to end the war, moving for summary judgment on the Sherman Act claims. For the reasons set forth below, their motions will be granted.

BACKGROUND

With the single exception discussed below, the underlying facts in this case are not in dispute.[1] American sells tickets on its flights in two ways. Thirty percent are sold by American directly. Seventy percent are sold by authorized independent travel agencies. These travel agencies sell tickets for many airlines, and engage in a number of additional services: They provide their clients with information and advice, make reservations, write and deliver tickets, notify customers of schedule changes, issue boarding passes and sell travel-related insurance.

In order to sell a ticket on an American flight, a travel agency must be accredited by the Airline Reporting Corporation ("the ARC"). Once accredited, an agency can apply to American for authorization, in which case it must agree to the standard ARC Travel Agency Agreement ("the ARC Agreement") and American's addendum to it.

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[1] In their memoranda for summary judgment, defendants rely extensively on Judge Getzendanner's factual findings in denying the preliminary injunction. That was wrong, and if the defendants' lawyers would like to know why, they should revisit their notes from first year of law school. *See also University of Texas v. Canenisch*, 451 U.S. 390-95, 101 S.Ct. 1830, 1831-34, 68 L.Ed.2d 175 (1981) ("[F]indings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

An agency will also be able to sell tickets on American flights if it is an authorized agent for an airline with which American has entered into a Bilateral Interline Agreement ("a BIA Agreement"), unless American specifically notifies the other airline that its authorized travel agencies may not issue American tickets.

Pursuant to the ARC Agreement, a travel agency must check for availability with American before issuing a ticket. Once it does so, American bears any risk for the failure to abide by the terms of the ticket. The only risks travel agencies assume in selling tickets arise out of their own misconduct: Because credit card companies prohibit accepting credit card orders over the telephone, travel agencies selling tickets in this fashion assume the credit risk of these sales; in addition, if a travel agency fails to take "reasonable care" to protect tickets in their possession, it bears the risk of theft.

From 1981 through 1984, American's addendum to the ARC Agreement required travel agencies ticketing American flights to charge the same as American does. American would then pay the agencies a 10% commission on each sale. This contract expired on December 31, 1984.

On January 1, 1985, deregulation in the airline industry entered a new era as the Civil Aeronautics Board was disbanded and many airlines revoked their earlier policies forbidding travel agencies to sell discounted tickets. That month, Illinois Corporate Travel ("ICT"), an ARC accredited, and American authorized, travel agency opened a branch office under the name McTravel. McTravel was created as a discount travel agency. Rather than charge a traveller the full amount of an airline ticket, it would charge a set fee over the amount it had to pay the airline for the ticket—i.e., 90% of the full price established by the airline—and rebate the remainder of its 10% commission to the traveler. Because McTravel did not at first

have its own ARC accreditation, it used ICT to issue airline tickets.

On January 18, the Vice President of IVI called American's zone sales manager for Northern Illinois, Richard Gard, to inform him that McTravel was advertising discounts on airline tickets. He asked, "You aren't going to let these guys do this, are you?"

Later that day, Mr. Gard contacted American sales representative Susan Wellinghoff, who went to McTravel and advised McTravel President Richard Dickieson that discounting American tickets was forbidden. After a brief discussion, Ms. Wellinghoff told Mr. Dickieson that she would speak with Mr. Gard and get back to him.

On January 22, Ms. Wellinghoff and Mr. Dickieson met again. Ms. Wellinghoff explained that American had received complaints from IVI, one of the largest travel agencies in the Chicago area, regarding McTravel's advertising. She also clarified that American was no longer enforcing its earlier policy of prohibiting discounted fares, but that American would not permit advertising of these discounts. She told Mr. Dickieson that if McTravel persisted in its advertising, American would revoke McTravel's authority to issue American tickets. After this meeting, Mr. Dickieson's efforts to discuss the matter further with American were rebuffed.

In March, McTravel received ARC accreditation, but American has refused to authorize McTravel to sell American tickets, and has notified other airlines that it will no longer honor tickets issued by their authorized travel agencies. Accordingly, McTravel is operating today without the ability to sell tickets on American flights.

The only disputed factual issue lies in American's motivation for prohibiting McTravel from advertising discounts. American maintains that the policy against advertising discounts arose out of a meeting in late 1984

at which it was determined that the policy against discounting was impossible to enforce but that a policy prohibiting advertising would be both effective and enforceable. American points to a letter dated January 3, 1985, which explained that American's addendum to the new ARC Agreement prohibits advertising discounted fares, as establishing that the policy was put into place prior to the complaint from IVI. American concedes that its protest to McTravel's advertising was made in response to the call from IVI, but insists that the decision to deny McTravel the authority to issue American tickets was an independent one.

McTravel contends that both the decision and the policy were direct responses to complaints from IVI and other large travel agencies regarding McTravel's advertisements. It notes that, notwithstanding the date on the letter accompanying the new ARC Agreement and addendum, there is no evidence that any travel agency actually received the letter prior to February, 1985. It also points out that IVI and American had an express agreement relating to advertised discounts and that American took action against McTravel only after IVI complained about McTravel's advertising. McTravel argues that these facts create a genuine issue of fact as to whether American's no-advertising policy arose independently or, instead, resulted from the objections of McTravel's large competitors.

DISCUSSION

Section 1 of the Sherman Act proscribes any "contract, combination . . . or conspiracy in restraint of trade." 15 U.S.C. § 1. The Supreme Court has long held that, notwithstanding its unqualified language, § 1 "was intended to prohibit only unreasonable restraints of trade." *Business Electronic Corp. v. Sharp Electronics Corp.*, ___ U.S. ___, 108 S.Ct. 1515, 1519, 99 L.Ed.2d 808 (1988). In most cases, "whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case ap-

plication of the so-called rule of reason—that is, 'the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.' " *Id.* (quoting *Continental, T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977)).

At the same time, however, the Supreme Court has determined that certain categories of agreements are so "manifestly anticompetitive"—"always or almost always tend[ing] to restrict competition and decrease output," *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90, 105 S.Ct. 2613, 2616-17, 86 L.Ed.2d 202 (1985)—that they are *per se* illegal. *Continental, T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 50, 97 S.Ct. at 2557. Once a plaintiff establishes that it has been injured by such an agreement, the plaintiff need prove nothing more in order to recover for its injury. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). Both concerted refusals to deal sparked by competitors of the refused, *Klor's Inc. v. Broadway—Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), and concerted agreements on resale prices (or the advertisement of resale prices), *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), constitute *per se* violations of § 1.

McTravel presents three separate theories to support its allegations that American's refusal to allow it to issue American tickets violates § 1 of the Sherman Act. Count I claims that American's response to IVI's complaint constitutes a conspiratorial refusal to deal. Count II claims that American's actions in furtherance of the no-advertising agreement with other travel agencies represent concerted resale price maintenance. Count III claims that American's insistence that McTravel abide by the no-ad-

vertising policy is itself resale price maintenance in violation of § 1. Since all three claims allege conduct subject to the *per se* rule, McTravel argues that not only is summary judgment for defendants inappropriate, but that McTravel is entitled to judgment under each of its claims.

American does not deny at this juncture that the refusal to deal with McTravel, and the policy against advertising discounts, constitute unreasonable restraints of trade. Instead, it focuses on the § 1 requirement that, to be unlawful, such restraints involve concerted action. As Justice Rhenquist has explained.

> [T]here is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Monsanto Co. v. SprayRite Services Corp., 465 U.S. 752, 760-61, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1974). "Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination or conspiracy—it leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization) that may be indistinguishable from the conduct of two firms subject to § 1 liability." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984); *see also United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); *United States v. Colgate*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919).[2]

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[2] McTravel seems to believe that even if it loses its arguments for

Taking the counts in reverse order, McTravel bases its resale price maintenance claim in Count III on American's relationship with McTravel alone. Although the Supreme Court has stated that a plaintiff can charge concerted action between himself and the supplier "as of the day he unwillingly complied with the restrictive franchise agreements," *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed. 2d 982 (1968), American points out, and McTravel concedes, that McTravel never agreed to American's no-advertising demands. Accordingly, McTravel cannot establish concerted action between it and American, *Santa Clara Valley Distributing v. Pabst Brewery*, 556 F.2d 942, 945 & n. 3 (9th Cir.1977),[3] and American is entitled to summary judgment on this count.

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per se illegality, it is still entitled to a trial under the rule of reason—perhaps because Judge Easterbrook undertook rule of reason analysis in one part of the *Illinois Corporate Travel* opinion. Yet, the *per se* rule of reason dichotomy depends entirely on the type of concerted activity at issue: price restraints are *per se* illegal; non-price restraints are subject to the rule of reason. Judge Easterbrook's inquiry under the rule of reason apparently reflects his hope that the Supreme Court will do away with the *per se* rule entirely, and subject all concerted restraints of trade to rule of reason analysis. *See Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d at 730-31 (Flaum, J., concurring in the judgment). But it in no way negates McTravel's burden to establish a concerted restraint of trade in the first place—the critical issue in the defendants' motions for summary judgment on all three claims. (In *Business Electronic Corp v. Sharp Electronics Corp.*, ___ U.S. ___, 108 S.Ct. 1515, 1519, 99 L.Ed.2d 808 (1988), the Supreme Court reiterated that price fixing agreements remain illegal *per se* under § 1.)

[3] Although courts and commentators have observed that "it makes no sense to deny recovery to a pressured retailer who resists temptation to the last and grant it to one who momentarily yields but is restored to virtue by the vision of treble damages," *Albrecht v. Herald Co.*, 390 U.S. 145, 162, 88 S.Ct. 869, 878, 19 L.Ed.2d 998 (1968) (Harland, J., dissenting); *Sahm v. V-1 Oil Co.*, 402 F.2d 69, 71 (10th Cir. 1968); VII Areeda, *Antitrust Law*, ¶ 1452 at 132 (1986), "it is clear that if the plaintiff . . . concedes that alleged pricing pressures never interfered

The other two counts are predicated on the relationship between American and IVI, and as such require a more extensive analysis. Count II focuses on the ARC Agreement and American's addendum prohibiting the advertising of discounts. To avoid summary judgment, McTravel must establish a genuine issue of fact as to whether American and IVI entered into an illegal agreement "that caused [McTravel] to suffer a cognizable injury." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

An agreement between a supplier and one of its distributors regarding prices is generally *per se* unlawful under § 1. Moreover, a causal connection between such an agreement and the termination of a non-agreeing distributor can usually be inferred because "[the agreement] may be necessary to maintain [the] agreement[ ] with [the] complying dealer[ ]," VII Areeda, *Antitrust Law*, ¶ 1446 at 1459; *see Monsanto Co. v. SprayRite Services Corp.*, 465 U.S. at 767-68, 104 S.Ct. at 1472-73. In light of American's concession that it has an agreement with IVI on the advertising of discounts,[4] and the uncontested fact that American moved against McTravel almost immediately after receiving the complaint from IVI, McTravel argues that there is, at least, a jury question as to whether it is a victim of an illegal resale price maintenance agreement.

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with his resale pricing decisions, coerced acquiescence, and hence unlawful agreement, is not established." 2 Van Kalinowski, *Antitrust Laws and Trade Regulation*, § 6B.02[2] at 6B-25 (1988).

[4] IVI apparently does not concur in American's concession that the two had an agreement on advertising, arguing that although the policy was included in American's addendum to the 1985 ARC Agreement, IVI never actually agreed to the policy. Nevertheless, in light of American's concession, and the fact that travel agencies *must* accept the terms of any American addendums in order to remain authorized agents of American, there exists, at least, a genuine issue of fact regarding whether an agreement on advertising existed.

McTravel would be right,[5] were it not for a special limited exception to the prohibition against resale price agreements between suppliers and resellers. In *United States v. General Electric Co.*, 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926), the Supreme Court held that § 1 does not apply to price restrictions imposed by suppliers on their agents. "The owner of an article . . . is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title directly from him to the consumer." *Id.* at 488, 47 S.Ct. at 196.

In ruling on McTravel's motion for a preliminary injunction, Judge Getzendanner noted that this exception was called into question by *Simpson v. Union Oil Co.*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964). *Simpson* held that consignment arrangements between an oil company and its distributors did not protect them from liability for price-fixing under § 1. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 85 C 7079, slip op. at 8. Nevertheless, the district court interpreted *Simpson* as standing only for the proposition that where a traditional supplier-reseller relationship exists—where the "consignees bear the

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[5] The defendants' argument that *Monsanto Co. v. SprayRite Services Corp.*, 465 U.S. 752, 760-61, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984), precludes finding the requisite causal connection between IVI's complaint and American's action against McTravel demonstrates their misunderstanding of the *Monsanto* ruling. In that case, the Supreme Court ruled that complaints from the plaintiff's competitors, followed by action on the part of the manufacturer, were insufficient to establish the existence of an agreement between the competitors and the manufacturer. *Id.* at 763, 104 S.Ct. at 1470. The Court did not say that, once such an agreement is shown, a complaint is insufficient to establish that the manufacturer's subsequent action against the plaintiff resulted from the agreement. On the contrary, the existence of an agreement followed by a complaint will always or almost always, be enough to allow a jury to find the requisite causal connection between the agreement and the manufacturer's subsequent action. *See* VII Areeda, *Antitrust Law*, ¶ 1446 at 1459.

risk of the distribution process" and act as "independent businessmen"—§ 1 liability cannot be avoided by the use of consignment arrangements which leave technical ownership of the products in the supplier until the date of resale. *Id.* at 8-9 (citing *Hardwick v. Nu-Way Oil Co., Inc.*, 589 F.2d 806 (5th Cir.), *cert. denied*, 444 U.S. 836, 100 S.Ct. 70, 62 L.Ed.2d 46 (1979); *Fuchs Sugars & Syrups, Inc. v. Amstar*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917, 100 S.Ct. 232, 62 L.Ed.2d 172 (1979)). Judge Getzendanner then proceeded to find that travel agencies are "true agents" of the airlines:

> A travel agent does not assume the significant risks and duties that resellers in a vast distribution scheme assume. The travel agent has no risk of unsold inventory, no credit risk, no authority to set prices, and no freedom to sell the product without checking with the airline for availability. The product is delivered directly from the airline to the customer, and the travel agent never takes "title" to the airline seat or assumes the risk that a particular seat may go unsold.

Id. at 11. Accordingly, the district court concluded that McTravel could not prevail on the resale price maintenance claim predicated on the no-advertising agreement.

In affirming this ruling, the Seventh Circuit noted that, after Judge Getzendanner had ruled, it had "concluded in *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir.1986), that *General Electric* is still healthy." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d at 724; *accord Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215 (8th Cir.1987), *cert. denied*, ___U.S. ___, 108 S.Ct. 751, 98 L.Ed. 2d 763 (1988); *see also Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S.Ct. at 1524 (§ 1 "does not apply to restrictions on price to be charged by one who is in reality an agent of, not a buyer from, the manufacturer."). "The appropriate inquiry is 'whether the agency relationship has a function other than to circum-

vent the rule against price fixing,' " *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d at 725 (quoting *Morrison v. Murray Biscuit Co.*, 797 F.2d at 1436)—whether, "objectively viewed, the arrangement serves one of the economic functions of agencies in general, such as apportioning risk, or lodging pricing decisions in the firm best able to gauge market conditions." *Id.* at 726.

The Seventh Circuit agreed with Judge Getzendanner that this analysis "supports the . . . conclusion that McTravel is an agent of airlines and not a reseller." *Id.* McTravel, for its part, clings to the parenthetical at the end of this discussion:

> Of course, conclusions that depend on the record compiled so far might be altered if additional facts adduced at trial show that the district court has mischaracterized the nature of the relationship between airlines and travel service operators. Here and elsewhere, we speak only of the conclusion drawn on the basis of the existing record.

Id. McTravel insists that its additional evidence showing that, on virtually all sales, it assumes the credit risk, and that it engages in substantial activities in addition to ticketing airline passengers, mandates a re-evaluation of Judge Getzendanner's finding. This court disagrees.

First, it is worth noting that the relationship at issue here is the one between American and IVI, not the one between American and McTravel. Although Judge Easterbrook appeared to read Judge Getzendanner's ruling as finding a principal/agent relationship between American and McTravel, *see id.*, what the district judge actually found was that "there is a true agent/principal relationship between American and its *travel agents.*" *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 85 C 7079, slip op. at 11 (emphasis added). Indeed, Judge Easterbrook's reading must have been an oversight. Since Count

II (unlike Count III) is predicated on the allegedly illegal price-fixing agreement between American and IVI, the relevant inquiry for determining the agreement's legality is whether American and IVI were supplier and reseller or principal and agent. By focusing on its own relationship with American, McTravel missed the boat—or, if you will, the plane.

Yet, even assuming that McTravel's relationship with American is standard for travel agencies, so that the additional evidence it supplied on this score can be used in examining the IVI-American relationship, McTravel cannot escape summary judgment. The fact that travel agencies engage in activities outside of their roles as agents for the airlines has no bearing on their status as agents with respect to the sale of airline tickets. *Ryko Mfg. Co. v. Eden Services*, 823 F.2d at 1124. And McTravel's efforts to make capital out of the fact that travel agencies assume the credit risk on credit card sales over the telephone is unavailing. As American points out:

> Airlines do not force travel agents to accept telephone credit card sales. . . . McTravel admits that not obtaining a signature and card imprint on telephone sales is contrary to ARC policies, and that if it follows the proper procedures, it has no credit risk. Any risk that McTravel assumes by accepting *unauthorized* methods of payment is a risk that is peculiarly within its control and does not change its status from an agent to a reseller. *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 343 (9th Cir. 1983).

American's Reply Brief at 26 (citing McTravel's Opposing Mem. at 27 n.9); *see also American Oil v. McMullin*, 508 F.2d 1345, 1349 (10th Cir.1975).

Indeed, McTravel's argument that travel agencies do not serve as agents of the airlines in issuing tickets appears almost facetious in light of the disclaimer it provides in documents to its customers: "McTravel is only an agent

for the airlines, hotels and car rental companies, which means that they pay us to help you buy services from them. Therefore, we are not responsible for the acts of those airlines, hotels and rental companies, and we cannot guarantee that they will do what they promise to do." McTravel wants to be considered an agent of the airlines for some purposes and a reseller of airline tickets for others.

It cannot. As their title indicates, travel agencies are agents. In an effort to avoid the ramifications of this fact, McTravel makes one final thrust. It asserts in a single sentence of its response brief that the fact that American sells some 30% of its tickets directly to travelers vitiates the agency exception to § 1 liability here because "the rule allowing a principal to set the price at which its agent sells has no application when they are horizontal competitors." McTravel's Response Brief at 22-23 (citing *United States v. Masonite Corp.*, 316 U.S. 265, 62 S.Ct. 1070, 86 L.Ed. 1461 (1942); *Sun Oil Company v. F.T.C.*, 350 F.2d 624, 633-34 (7th Cir. 1965), *cert. denied*, 382 U.S. 982, 86 S.Ct. 559, 17 L.Ed.2d 473 (1966)).[6] Judge Getzendanner twice rejected this position, finding that although American does act as a travel agency for a substantial portion of its sales, "there is no true competition between the airline and the agent." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 85 C 7079, slip op. at 10-11, *on rehearing*, slip op. at 8 (January 8, 1986) [1986 WL 891].

Yet, Judge Getzendanner's finding at the preliminary injunction stage does not mean that there is no genuine factual issue on this score. McTravel has presented testimony of a number of competent witnesses that airlines

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[6] Despite more than one hundred pages of rambling text, the defendants made no mention of these two cases, relying instead on Judge Getzendanner's factual finding that American does not compete with travel agencies. Footnote 1 above and the discussion below will hopefully clarify for the defendants the inadequacy of their responses.

do compete with travel agencies for sales. If, as McTravel contends, the agency exception does not apply when the principal competes at the same level of distribution as its agents, then McTravel has the right to have a jury resolve the factual dispute.

In *Masonite*, the Supreme Court held that *General Electric* did not protect the holder of a patent on hardboard who had entered into an agreement with its competitors under which the product was shipped to the competitors on consignment, title remained in the patent-holder, and the patent-holder set the prices at which the product was to be sold. McTravel reads this case as establishing that *General Electric*'s agency exception to § 1 does not apply whenever the principal is in competition with its agents.

The problem with this interpretation of *Masonite* is that, in *General Electric*, the principal, a patent holder and manufacturer of electric lamps, sold the lamps both directly through its employees and through authorized agents. Thus, if McTravel's interpretation of *Masonite* is correct, then *Masonite* did not merely distinguish *General Electric;* rather, it effectively overruled the earlier case.

In *Sun Oil*, the Seventh Circuit seemed to hold that *Masonite* did just that. *Sun Oil* was an appeal from a Federal Trade Commission finding that Sun had violated § 1 through a consignment arrangement with its dealers similar to the one held illegal in *Simpson*. The FTC, having ruled before the Supreme Court handed down *Simpson*, had determined that *General Electric* did not protect Sun, on the grounds that, because there was both horizontal price fixing among the dealers in addition to vertical price fixing between Sun and each dealer, *Masonite* controlled.

By the time the Seventh Circuit ruled on the appeal, the Supreme Court had issued its ruling in *Simpson*. Thus, the Court of Appeals was easily able to affirm the FTC's ruling on the basis of that opinion. 350 F.2d at 635. Nevertheless, the Court also indicated that *Masonite* alone jus-

tified the FTC's determination that *General Electric*'s agency exception did not apply. 350 F.2d 633-35. The Court concluded by noting that the combination of *Masonite* and *Simpson* left *General Electric* narrowly limited to "its special facts." 350 F.2d at 635. "Thus limited, it is now undoubtedly the law that, with regard to unpatented products, no such 'exception' exists." *Id.*

Were *Sun Oil* the last word by the Seventh Circuit on this issue, McTravel would clearly prevail here. But it is not. In *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986), the Court unequivocally revitalized *General Electric*'s agency exception for ordinary manufacturers as well as patent holders. In so doing, it read *Simpson* and *Masonite* as narrow holdings prohibiting manufacturers from merely labelling dealers and competitors as agents in order "to circumvent the rule against price fixing." 797 F.2d at 1436.

Judge Easterbrooks' principal-agent analysis in ruling on McTravel's appeal confirms that *Morrison* applies to this case, so that unless McTravel can establish a genuine issue of fact as to whether IVI was a "true agent" of American, defendants are entitled to summary judgment here.[7] As discussed above, it cannot. Accordingly, the

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[7] McTravel makes much of Judge Easterbrook's suggestion that price fixing agreements between principals and agents may be subject to the rule of reason. Yet, as Judge Easterbrook noted, and defendants emphasize, every case that has found a true agency relationship has upheld the price fixing agreement without further analysis. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d at 729. So long as the agency relationship is a bona fide one, a price fixing agreement between a principal and an agent is lawful. The Supreme Court's condemnation of the agreements in *Masonite*, though appearing at first blush to be the result of an extensive rule of reason analysis, is better viewed as reflecting the Court's conclusion that the patentee was using the agency label as a subterfuge "to enlarge that monopoly of the patent." *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661, 666, 64 S.Ct. 268, 271, 88 L.Ed 376 (1944); *Morrison v. Murray Biscuit Co.*, 797 F.2d at 1437.

agreement between American and IVI regarding the advertising of discounts is legal under § 1 of the Sherman Act, and the defendants are entitled to summary judgment on Count II.

Count I, like Count II, attacks the relationship between American and IVI and American's response to IVI's complaint, but it does so with a slightly different focus. Count I alleges as the illegal concerted action not the contract between American and IVI, but an alleged conspiracy between them, initiated by IVI, to deprive McTravel of the ability to compete with IVI by prohibiting McTravel from selling discounted American tickets.

This court is aware of no case which has expressly held that a principal and an agent, though protected from § 1 liability for a contract in restraint of trade, can nonetheless be held liable for a conspiracy in restraint of trade when the alleged conspiracy arises out of the lawful contract. Yet, neither IVI nor American have raised this defense to Count I, and the Seventh Circuit appears to have accepted the validity of McTravel's claim if McTravel can show that "American conspired with other travel agencies to cut off competition from an upstart with a novel way of doing business." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d at 726. In other words, although American and IVI cannot be held liable solely for their agreement on the advertising of discounts, they could be held liable if this agreement flowed, not from American's unilateral determination of an appropriate advertising policy, but instead from a conspiracy initiated by IVI to thwart its discounting competitors.

American presented two defenses to this claim in its argument before Judge Getzendanner. "First, it argue[d] under the intra-enterprise conspiracy doctrine that as a matter of law a principal cannot conspire with its agent. Next, American argue[d] that there is insufficient evidence of such conspiracy to justify the issuance of a primary

injunction." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 85 C 7079, slip op. at 11.

Judge Getzendanner ruled that the intra-enterprise conspiracy doctrine, most recently discussed by the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (a corporate parent cannot conspire with its wholly owned subsidiary), does not apply with respect to the principal-agent relationship at issue in this case because "American and each of its travel agents [are not] a single economic entity with a complete unity of purpose." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 85 C 7079, slip op. at 11 (citing *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968)). The Seventh Circuit agreed, *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d at 726, and American has not pursued this argument here.

American does challenge, however, McTravel's contention that the evidence creates a genuine issue of fact as to whether American acted against McTravel because of an illegal conspiracy with IVI. An immediate problem with American's argument and McTravel's response is that they ignore the distinction between Count I and Count II, and thus misapply cases with fact patterns closer to the latter.

Monsanto Co. v. SprayRite Services Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), and other cases dealing with the evidentiary burden required to get to the jury on an allegation of concerted action in a § 1 case did not involve principal-agency relationships. The sole issue in those cases was the nature of the evidence needed to establish an agreement between the manufacturer and the distributor. In this case, by contrast, there is no question that American and IVI had an agreement on advertising, and that there is sufficient evidence for a jury to find that American's action

against McTravel was causally related to this agreement. This genuine factual issue does not help McTravel, however, because the principal-agent relationship between American and IVI makes this agreement legal. Instead, to get to the jury on Count I, McTravel must establish a genuine issue of fact as to whether this agreement came about as a result of IVI's efforts to keep McTravel from successfully competing as a discount travel agency.

McTravel contends that the factual dispute over the timing of American's decision to implement its no-advertising policy suffices. Since the jury could find that the policy arose only after IVI (and other travel agencies) complained to American, McTravel insists that a jury also could find that American was serving as IVI's "cat's paw." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d at 726.

In *Monsanto*, the Supreme Court ruled that, to get to a jury on a § 1 claim, "there must be evidence that tends to exclude the possibility of independent action by the manufacturer and the distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. SprayRite Services Corp.*, 465 U.S. 768, 104 S.Ct. at 1472-73. Complaints from the plaintiff's competitors, followed by action on the part of the manufacturer are insufficient to meet this burden: "Permitting an agreement to be inferred from the existence of complaints, or even from the fact that termination came about 'in response to' complaints could deter or penalize perfectly legitimate conduct." *Id.* at 763, 104 S.Ct. at 1470.

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), went one step further. "[I]f the factual context renders [plaintiff's] claim implausible—if the claim is one that sim-

ply makes no economic sense—[plaintiff] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Id.* at 1356.

It is clear that American took action against McTravel in response to IVI's complaint. Even under *Monsanto* alone, however, this dispute does not suffice to establish a genuine issue as to the existence of an unlawful conspiracy between IVI and American. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d at 726 ("Evidence that American discussed both price and McTravel with other agents does not support an inference of conspiracy.").

Matsushita enlarges this deficiency. Since it was lawful for American to enter into the no-advertising agreement with IVI, McTravel must show not only that an agreement existed, but that the agreement was sparked by IVI. To demonstrate that this was this case, McTravel argues that the policy was contrary to American's pecuniary interests: Since American receives the same amount from its agents irrespective of the price they charge their customers, the sale of discounted tickets, which can only result in additional sales, increases American's revenue. Yet this very argument brings *Matsushita*'s added evidentiary burden into play. McTravel has presented nothing to satisfy this burden. The defendants are entitled to summary judgment on Count I.

CONCLUSION

The defendants are entitled to summary judgment on the three remaining counts in the complaint. Judgment is entered for the defendants.

ON MOTION FOR RECONSIDERATION

In well-written and undoubtedly heartfelt memoranda, McTravel has moved for reconsideration of this court's

November 18, 1988 order granting summary judgment for American and IVI. Because that order sufficiently addressed most of the arguments in McTravel's current motion, this court will deal with McTravel's renewed arguments in summary fashion.

The complaint contained three counts: Count I alleged a concerted refusal to deal; Count II alleged horizontal resale price maintenance; Count III alleged vertical resale price maintenance. Although the court addressed them in reverse order in the initial decision, the court will tackle them sequentially here.

With regard to Count I, the court held that to prove a concerted refusal to deal, McTravel had to show that its termination flowed from IVI's efforts to wipe out its discounting competitor. The fact that there was a *contract* on resale price maintenance was not enough because *that* agreement was lawful per the agency exception. McTravel's argument—that the court found an agreement between American and IVI so nothing more need be shown to get to the jury—ignores that ruling. The "agreement" it says this court found in the decision was an agreement on *prices*, not an agreement to terminate McTravel, and thus was insufficient to establish unlawful concerted action.

Indeed, McTravel's reference to the Supreme Court's ruling in *Monsanto* that, once a price-fixing agreement is established, the court can infer that any subsequent refusal to deal by the manufacturer resulted from this agreement, only proves the point. For if that inference held even in cases of price-fixing agreements between principals and their agents, then the agency exception to § 1 would be meaningless. It is not.

As for Count II, McTravel contends that this court erred in interpreting *Masonite*, the Supreme Court ruling that followed *General Electric* and that *Sun Oil* interpreted as effectively nullifying *General Electric*'s agency exception.

McTravel asserts that *Masonite* stands for the proposition that where the manufacturer and the distributor compete at the distribution level, the agency exception does not apply. Thus, since there is a genuine factual issue as to whether American competed with travel agencies, McTravel contends that the agency exception does not apply here.

Yet, as this court pointed out in its decision, *General Electric* also involved horizontal competition between the manufacturer and the distributor, so if *Masonite* stands for what McTravel says it does, "then *Masonite* did not merely distinguish *General Electric;* rather, it effectively overruled the earlier case." The question thus becomes whether to read *Masonite*, or instead *General Electric*, narrowly. *Sun Oil* (the Seventh Circuit's 1966 case), suggested that *General Electric* was the narrow ruling, and that *Masonite* was the broad one—effectively vitiating the agency exception. But *Morrison* and *Illinois Corporate Travel*, two Seventh Circuit cases within the past three years, have (implicitly) rejected *Sun Oil* and have stated unequivocally that *General Electric*'s broad agency exception applies. Since, as noted above, *General Electric* also involved horizontal competition between the manufacturer and its distributors, McTravel's argument that the (alleged) competition between American and its travel agents takes this case outside the agency exception is incorrect.*

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* In its reply memorandum, McTravel concedes that its argument is not that this court has misread *Morrison* and *Illinois Corporate Travel*, but is instead that the Seventh Circuit has misread *General Electric* and *Masonite*. According to McTravel, a court of appeals has no authority to refuse to follow a Supreme Court ruling, and when it does so, the district court must ignore the circuit court opinion and follow the Supreme Court. *But see Indianapolis Airport v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984).

Fortunately, this court need not decide whether McTravel is correct on this point. Although *Morrison* and *Illinois Corporate Travel* overruled *Sun Oil*'s reading of *General Electric* and *Masonite*, they did not

Finally, with respect to Count III, this court held that there was no agreement between McTravel and American on prices, so McTravel could not state a claim for *concerted* resale price maintenance between McTravel and American. McTravel insists, however, that because it was approved by the ARC, and because American filed a general concurrence to the ARC, McTravel and American did have an agreement on advertising. Yet, McTravel did not gain the recognition of the ARC until March, whereas the fracas between American and McTravel occurred in January. Thus, it is erroneous to suggest that McTravel and American ever agreed on the advertising policy. Moreover, even if they did, the agency exception would still bar McTravel's claim.

McTravel concludes by arguing that this court erred in finding a true agency relationship between American and its travel agents, listing six factual issues on which it says the court misread the record. Yet, when McTravel asserts in its reply memorandum that the agency relationship between American and travel agencies "serves no function other than to circumvent the rule against price-fixing," it essentially concedes what this court has already found: There is an agency relationship between American and travel agencies. To be sure, McTravel insists that this agency relationship is not a bona fide one, but that argument has absolutely no support anywhere in McTravel's evidence; indeed, McTravel does not even hint at another way by which American could efficiently and effectively sell its tickets to customers. In any case, this court remains convinced that its analysis of the relationship between airlines and travel agents was correct and that accordingly,

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overrule either of the two Supreme Court opinions. *General Electric* and *Masonite* involved similar fact patterns but came out differently, and it was up to the circuit courts to determine which was the broad holding and which was the narrow one. *Sun Oil* came out one way; *Morrison* and *Illinois Corporate Travel* came out another. But none of the three overruled either of the two, and therefore this court has no choice but to abide by the Seventh Circuit's more recent approach.

as a matter of law, American and its travel agencies have a true agency relationship.

McTravel's motion to reconsider must therefore be denied.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 89-1230

ILLINOIS CORPORATE TRAVEL, INC., doing business as McTravel Travel Services,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC., and IVI Travel, Inc.,
Defendants-Appellees.

Argued Sept. 21, 1989.

Decided Nov. 13, 1989.

Steven B. Varick and Malcolm H. Brooks, McBride, Baker & Coles, Jeffrey R. Liebman, Arvey, Hodes, Costello & Burman, Chicago, Ill., for plaintiff-appellant.

Jay Conison and Alan H. Silberman, Sonnenschein, Carlin, Nath & Rosenthal, David Marx, Jr., John G. Simons and Mark L. Yeager, McDermott, Will & Emery, Clay H. Phillips and Mary P. Chapin, Russell M. Pelton, Peterson, Ross, Schloerb & Seidel, Chicago, Ill., Steven C. McCracken, Michael J. Rider, Gibson, Dunn & Crutcher, Newport Beach, Cal., for defendants-appellees.

Before WOOD, EASTERBROOK, and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge.

American Airlines would like to ban discounting by the firms that sell its tickets, but a prohibition cannot be enforced. Under-the-table discounts, rebates by "captives" (travel subsidiaries of the firms whose employees are traveling), and tie-in sales (packages of air travel and other

services such as hotels, with the price reduction on the air fare allocated for bookkeeping purposes to the hotel or car rental) are endemic. American decided to demand only what it was prepared to enforce: it issued an Addendum to the agreement all travel service operators must sign forbidding those selling its tickets to *advertise* that they offer discounts. A division of Illinois Corporate Travel, Inc., operating under the name McTravel Travel Services, advertised discounts on American; American denied it access to the plate used to issue its tickets and informed other air carriers that it would not accept tickets McTravel wrote using other carriers' plates.

McTravel sued under the Sherman Act, 15 U.S.C. § 1, and in 1986 we affirmed a decision declining to issue a preliminary injunction against American's rule. 806 F.2d 722 (7th Cir.1986). After discovery, the district court dismissed some counts of the complaint and then granted summary judgment for American. 682 F.Supp. 378, 700 F.Supp. 1485 (N.D.Ill.1988). Because our earlier opinion and the district court's two subsequent opinions rehearse the facts, we deal briefly with McTravel's contentions.

We concluded in 1986 that although a ban on price advertising is a form of resale price maintenance, the per se rule against this practice does not apply when the vendor is a genuine agent. See also *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir.1986); *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168 (7th Cir.1988). McTravel asks us to reexamine this conclusion, observing that air travel may be decomposed into two products: the transportation, which American sells, and the reservation and ticketing service, which McTravel sells. American sets the net price it receives, without complaint from McTravel, which seeks only to advertise that it charges for its service a flat fee that usually is less than the 10% standard in the industry. Any agent—indeed any employee—could make the same distinction, however, and if it prevailed the agency exception to the rule against resale price maintenance would be

defunct. Producers of goods and services may have solid reasons for putting their agents on commission rather than a fixed markup. Commissions align the agents' interests with those of the principal; they do well or poorly together, which induces the agents to work harder in the principals' interests. If the travel business is a genuine agency relation, then the principal is no less entitled to decide between commission and piecework rates than it is entitled to decide the net price for its product.

When the case was here in 1986, we thought it tolerably clear that travel service operators are the air carriers' agents. They carry no inventory and can book space only by requesting it from the carrier's computer; air carriers set the price for each ticket (sometimes changing the allocation of seats among price and travel-date-restriction categories by the hour), produce the service, deliver it direct to travelers, and take the risk of unsold seats. Although each travel service operator (conventionally called a "travel agent", a telling phrase) works with many airlines, hotel chains, and other suppliers of travel services, this is a common form of organization. Real estate agents work for many clients, and multiple-listing services allow many agents access to the same properties; auction houses sell works of art furnished by hundreds of owners at a single sitting.

McTravel insists that development of the record since 1986 has produced disputes about questions of material fact, but the only fact to which McTravel points is not disputed: airlines and banks bear the flyers' credit risks, *unless* the travel service operator takes a check or gives credit without complying with the requirements of the credit card's issuer. McTravel observes that whenever it issues a ticket on the basis of a credit card number received by phone it must take the risk, because the credit card issuers will accept the risk only when the vendor obtains an imprint and signature. No one disputes this, but although an agent may decide to take more risk than

it has to, a unilateral decision does not change the nature of the agency. Many a clerk at Sears has found that loss from unauthorized credit (or failure of the cash drawer to tally with the tape) comes out of his own pocket; this does not make the relation less one of employment. So too with travel service operators, especially when the risk has scarcely been realized. McTravel has identified only three reversed charges in its history. Travel service operators are "agents" for purposes of antitrust law when they sell tickets for air carriers' accounts. Bulk sales—outright purchases by the travel agents and resales to flyers—are a different matter. American does not object to advertising discounts on such tickets, on which the travel agents are standard retailers.

American has its own reservation and ticketing service, which not only sells air travel but also makes hotel and rental car reservations in competition with its agents. Dual distribution makes an agreement "horizontal", according to McTravel, which brands it as illegal per se under the holding of *United States v. Masonite Corp.*, 316 U.S. 265, 62 S.Ct. 1070, 86 L.Ed. 1461 (1942). *Masonite* could be read this broadly, could even be read as eliminating the difference between agents and independent distributors, but we do not understand it so. Several makers of particle board reached an agreement under which all but Masonite retired from the business; those who quit became Masonite's "del credere agents" and sold its product at fixed prices. This was horizontal in an economically meaningful way. Producers to which consumers might turn for supply suddenly withdrew from the market. With supply down price had to rise, producing a monopoly overcharge. Although the (former) rivals contended that they were just knuckling under to the force of Masonite's patents, the Supreme Court saw a more sinister arrangement—properly so unless the patent was both broad and iron-clad, which could not be known once the former rivals started cooperating. An agreement between American and its travel

agents does not reduce supply from consumers' perspective; only an agreement among the air carriers could do that.

Reduced competition among travel agents to sell American's tickets has no effects different from those of vertical restraints that courts routinely sustain. Assigning discrete territories to resellers is governed by the Rule of Reason, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), and so is reserving particular customers for the manufacturer, to the exclusion of the dealers, *White Motor Co. v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963). The manufacturer that reserves customers, as in *White Motor*, is as much a rival of its dealers as is the manufacturer that allows competition among dealers for all customers and joins the fray itself—and the reservation of customers is the more effective restriction on distribution, as customers see things, because it leaves each customer with only one potential seller. Dual distribution therefore does not subject to the per se ban a practice that would be lawful if the manufacturer were not selling direct to customers; antitrust laws encourage rather than forbid this extra competition.

Because travel service operators are the air carriers' agent, the requirement to refrain from advertising a lower price is lawful per se, just as the obligation is lawful when fastened on one's employees. To say that regulating price advertising (like setting the price) is lawful is not necessarily to say that the whole practice is lawful. Perhaps a given arrangement does more than set the agents' price. Our 1986 opinion left open the possibility that McTravel could establish a violation of the antitrust laws under the Rule of Reason. On the first appeal McTravel argued that because any travel agent must be able to furnish tickets from all major air carriers if it is to survive, American's requirement could set the standard for the industry, as effective as any horizontal arrangement among suppliers with substantial market power. Proof has not been forth-

coming. So far as the record reveals, many travel agents, including McTravel itself, continue to be discounters on all flights and aggressive advertisers of this for carriers other than American. Nothing in American's Addendum forbids a travel agent to advertise that it gives discounts on other carriers' flights. Nothing in the record suggests that other carriers have followed American's practice or that travel agents have been dissuaded from discounting the flights of American's rivals. Summary judgment on the antitrust questions therefore was appropriate.

The district court dismissed on the pleadings three claims under Illinois law, one based on the state's Consumer Fraud and Deceptive Business Practices Act, Ill. Rev.Stat. ch. 121½ ¶¶ 261-62, the others on common law rules such as the prohibition against tortious interference with prospective contractual advantage. One of the claims the court dismissed without prejudice, relinquishing its pendent jurisdiction. The other two are preempted, the court held, by 49 U.S.C.App. § 1305(a)(1), which provides:

> [N]o State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this chapter to provide air transportation.

McTravel does not dispute the propriety of resolving questions of preemption under the pendent jurisdiction. See *Graf v. Elgin, Joliet & Eastern Ry.*, 790 F.2d 1341, 1345-48 (7th Cir.1986); cf. *LaBuhn v. Bulkmatic Transport Co.*, 865 F.2d 119 (7th Cir.1988). Neither does it dispute the holding of *Anderson v. US Air, Inc.*, 818 F.2d 49 (D.C.Cir.1987), that "law, rule, regulation, standard, or other provision" includes common as well as statutory law. It argues instead that state regulation or prohibition of contracts between air carrier and agent forbidding price

advertising does not "relat[e] to rates" within the meaning of § 1305(a)(1). Yet McTravel's antitrust claim depended on the proposition that to forbid the advertising of discounts *is* to set price (at least to influence it), a proposition with substantial support in both law, *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir.1961), and economics. Cf. *Bates v. State Bar of Arizona*, 433 U.S. 350, 377-78, 97 S.Ct. 2691, 2705-06, 53 L.Ed.2d 810 (1977).

Price advertising surely "relates to" price; the "relating to" language in § 1305(a)(1) substantially increases the extent of preemption. *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir.1984). (The same "relating to" language in ERISA has led to a startlingly broad preemption of state laws. E.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).) Although 49 U.S.C.App. § 1506 preserves state common law from implicit preemption, see *Bieneman v. City of Chicago*, 864 F.2d 463, 470-73 (7th Cir.1988), the preemption here is express rather than implied. If the state law relates to "rates, routes, or services", the absence of contrary federal law is irrelevant.

McTravel's submission that to advertise a rebate of its commission is not to advertise a lower price for air travel is a reprise of its argument that air travel and ticket dispensing are distinct services with separate prices; we rejected this when dealing with the antitrust claim, and it is no more compelling now. Both American and McTravel sell tickets nationwide. Section 1305(a)(1) ensures that the prices at which these sales occur to consumers, and the accompanying advertising, can proceed under a legal standard uniform nationwide. We need not consider the extent to which state laws may control deceptive advertising, require disclosures, or enforce (as opposed to upset) contracts between carriers and agents; it is enough to say that no state may require an air carrier to deal

with a would-be agent who refuses to respect a contract restricting advertising of discount prices.

AFFIRMED.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 89-1230

ILLINOIS CORPORATE TRAVEL, INC.,
d/b/a MCTRAVEL TRAVEL SERVICES,
Plaintiff-Appellant,

vs.

AMERICAN AIRLINES, INC., IVI TRAVEL, INC.,
and TRAVEL RITE, INC.,
Defendants-Appellees.

November 29, 1989.

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

On consideration of the "MOTION TO FILE PETITION FOR RECONSIDERATION, *EN BANC*, INSTANTER" filed November 28, 1989, by counsel for appellant,

IT IS ORDERED that this MOTION is DENIED.